This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 2044 078 604 121

HARVARD LAW LIBRARY

Wisconsin Supreme Court

WISCONSIN REPORTS

99

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MARCH 22—MAY 24, 1898

ERRATA — 99 WIS.

Page 169, line −1, and p. 170, line 1. For garnishment process, read voluntary assignment.

Page 378. At end of third headnote (line −1), add the word error.

CHICAGO
CALLAGHAN AND COMPANY
1899

65

Wisconsin Supreme Court

WISCONSIN REPORTS

99

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MARCH 22 — MAY 24, 1898

ERRATA — 99 Wis.

Page 169, line -1, and p. 170, line 1. For [illegible] read voluntary assignment.

Page 378. At end of third headnote line -1, add the word error

CHICAGO
CALLAGHAN AND COMPANY
1899

Entered according to Act of Congress in the year one thousand eight hundred and ninety-nine,
By WILLIAM H. FROEHLICH,
Secretary of State of the State of Wisconsin, in trust for the benefit of the people of the said state, in the office of the Librarian of Congress, at Washington.

Rec. Mar. 10, 1899.

STATE JOURNAL PRINTING COMPANY,
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
SILAS U. PINNEY,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN.

Attorney General, - WILLIAM H. MYLREA.

Clerk, - - - CLARENCE KELLOGG.

MEMORANDUM.

In the case of *Wentworth v. Racine County*, reported herein on p. 26, the mandate of this court was modified January 10, 1899, and the following opinion was filed January 12, 1899:

PER CURIAM. A motion for rehearing is made by respondent in this action for the purpose only of obtaining a modification of the mandate so that it shall provide for the entry of a judgment in respondent's favor for $83.22, which he claims he is entitled to recover even conceding that the statute in question be valid. Examination of two of the findings of fact made by the circuit court and not excepted to by the appellant shows that the respondent is correct in his contention. By the fourth finding of fact it appears that the county board disallowed a gross sum of $514.22 of the respondent's bill, and by the seventh finding it is found that the correct amount of the disallowance, as shown by examination of the itemized bill and conceding that the general principle upon which they acted was correct, was $431 and no more, evidently meaning that if the rates fixed by the resolution of the supervisors be applied to the items of respondent's bill the gross amount disallowed should have been only $431 instead of $514.22.

As said before, these findings are not excepted to and hence are verities in the case. It is proper to say that no mention was made of this fact either in the printed briefs or upon the argument of the case, but the efforts of counsel were concentrated upon the consideration of the validity of the law and the resolution of the board alone, and hence the facts herein stated naturally escaped notice. The mandate of the court will be modified so as to read as follows: Judgment of the circuit court reversed, and cause remanded with directions to render judgment for respondent for $83.22. In all other respects the motion for rehearing must be overruled without costs.

It is so ordered.

TABLE

OF

CASES REPORTED.

Ahnapee, Mayor and Common Council of, The State ex rel. Gericke v. 322
Allen, Ellis v. 598
Angell, Parlin & Orendorff Co. v. 297
Angell, Warder, Bushnell & Glessner Co. v. 298

Barth v. Koetting and others 242
Banks: Loans to cashiers: Resulting trusts in land: Fraudulent conveyances.

Barthell v. Hencke and another 660
Corporations: Attachment of stock: Service on *de jure* officer: Collateral attack.

Bassett v. Bassett 344
Divorce: Additional judgment for alimony.

Baumbach Co., Laube v. 171
Bayfield County, Crogster v. 1
Becker v. City of La Crosse 414
Municipal corporations: Rights and powers outside of state.

B. Hoffmann Mfg. Co. v. Western Stove & Mfg. Co. 53
Appeal on questions of fact.

Bleiler v. Moore and another 486
Fraudulent conveyances: Evidence as to intent: Argument to jury.

Blewett, Bragg v *348*
Bodah v. Town of Deer Creek *509*
Highways, liability for defects: Pleading.

Bostrak, Knutson v *469*
Bragg v. Blewett *348*
Appeal, parties to.

Bratt v. Swift and others *579*
Damages for conspiracy: Credibility of witnesses.

Bumbalek, Peehl v *62*

Carroll v. Chicago, Burlington & Northern R. Co *399*
Negligence: Fellow-servants: Practice, question for special finding.

Carver, Phillips v *561*
Chamberlain, The State ex rel. Goebel v *503*
Charles Baumbach Co. v. Laube *171*
Mechanic's lien: Pleading: Conditions precedent: Amendment: Notice of claim.

Chicago, Burlington & Northern R. Co., Carroll v *399*
Chicago, Milwaukee & St. Paul R. Co., Dewey v *455*
Chicago, Milwaukee & St. Paul R. Co., Schneider v ... *378*
Chicago & Northwestern R. Co., Hennesey v *109*
Chicago, St. Paul, M. & O. R. Co., Hunter v *613*
Claflin Co. v. Grashorn *356*
Colburn, Curry v *319*
Collins v. Hoehle *639*
Witness, impeachment of.

Collins v. City of Janesville *464*
Appeal: Damages for permanent injury: Expert testimony.

Collins, Rock v *630*
Crogster v. Bayfield County and others *1*
Constitutional law: Limitation of municipal indebtedness: Bonds in aid of railroad: Entire and severable contracts: Consideration.

Crowns v. Forest Land Co 10
Foreclosure of mortgage: Notice of appeal: Adverse party, who is: Pleading same facts in abatement and in bar: Frivolous pleading.

Curry v. Colburn and wife 319
Deed, delivery necessary: Evidence of.

Dahlman v. Greenwood 163
Voluntary assignment: Garnishment.

Dana v. Duluth Trust Co 663
Principal and agent: Purchase of tax title by agent: Reimbursement, when required as a condition of relief: Mortgages: Duty of owner of equity of redemption to pay taxes: Equity: Statute of frauds.

Darling and others v. Neumeister 426
Mechanic's lien: Homestead: Practice as to findings.

Day, Gores v 276
Deer Creek, Town of, Bodah v 509
Dewey v. Chicago, Milwaukee & St. Paul R. Co 455
Appeal, what reviewed: Railroads, when not liable for frightening horses.

Dexter, Milwaukee Cold Storage Co. v 214
Douglas County, Hennessy v 129
Duluth Trust Co., Dana v 663
Dyer v. Walker 404
Easement by prescription: Gate across right of way: Trespass.

Earley, Weyerhaeuser v 445
Ellis v. Allen and others 598
(1) Undertaking on appeal: Waiver of irregularity. (2–5) Foreclosure of mortgages: Fraud: Attorney and client: Appeal: Objection to jurisdiction: Costs.

Ellis v. Lampman 81
Appeal: Irregularity of undertaking: Waiver.

Elroy, City of, Field v 412
Estate of Robinson v. Hodgkin 327
Estates of decedents: Accounting by executor: Appeal.

Fidelity & Casualty Co., Foster v 447
Fidelity & Casualty Co., Griem v 530
Fiedler v. Howard 388

Conveyance to husband and wife: Joint estate: Consideration: Estoppel: Waiver of appeal.

Field v. City of Elroy 412

Appeal: Difficult question of law as to costs involved.

Field and others v. Siegel and another 605

Action for conspiracy to defraud creditor

Fond du Lac, City of, Schaefer v 333
Forest Land Co., Crowns v 103
Foster v. Fidelity & Casualty Co 447

Accident insurance: Notice of accident: Proof of death: Pleading: Waiver: Evidence: Appeal.

Franey v. Wauwatosa Park Co 40

Election of remedy.

Fred Miller Brewing Co. v. Manasse 99

Assignment of mortgage by indorsement of note: Notice by record.

Fricke, Travelers' Ins. Co. v 367
Fulton v. Stevens 307

Mutual life insurance: Forfeiture: Nonpayment of assessments: When liability of member terminates.

Gardner, Rosenow v 358
Gericke, The State ex rel., v. Mayor and Common Council of Ahnapee 322
Germantown Farmers' Mutual Ins. Co., Knopke v 289
Glendale Investment Asso., Limited Investment Asso. v. 54
Goebel, The State ex rel., v. Chamberlain 503
Goodrich Transportation Co., Slauson v 20
Gores v. Day 276

Corporations: Directors' liability for loss through fraud or negligence.

Grashorn, H. B. Claflin Co. v. 356
Greenwood, Dahlman v. 163
Griem v. Fidelity & Casualty Co 530

Insurance: Stipulation in policy limiting time for bringing action: Legal proceedings.

Guldemann v. Lerdall 495

Appeal, review on: Discharge in insolvency.

H. B. Claflin Co. v. Grashorn 356

Fraudulent conveyance: Participation by grantee.

Heiden, The State ex rel., v. Ryan 123
Heinemann, Schumaker v. 251
Hencke, Barthell v. 660
Hennesey v. Chicago & Northwestern R. Co. 109

Assumption of risk: Contributory negligence: Court and jury: Railroad company, liability of: Instructions.

Hennessy v. Douglas County and another 129

Municipal corporations: Superior city charter: Assessments for street improvements: Notice: Constitutional law: Due process.

Hodgkin, Estate of Robinson v. 327
Hoehle, Collins v. 639
Hoffmann Mfg. Co. v. Western Stove & Mfg. Co 53
Hogan, Siebrecht v. 437
Howard, Fiedler v. 388
Huguier v. Lord 650

Appeal: Review on evidence.

Hunter and another v. Chicago, St. Paul, M. & O. R. Co. 613

Highway: Railroad company, liability as to cattle guards: Appeal.

In re Roszcynialla 534

Criminal jurisdiction: *Habeas corpus:* Waiver.

Interstate Casualty Co., Kasten v. 73

Jacobs, Nelson v *547*
Jacobs, Perkins v *409*
Janesville, City of, Collins v *464*
Janesville, Mayor and Common Council of, McLellan v. *544*
Joint School District No. 2, Yahr v *281*
Jones and others v. Rice and others *429*

Deed: Evidence of mental capacity to execute.

Journal Printing Co., Pellardis v *156*

Kane v. Williams and another *65*

Appeal: Mortgage foreclosure: Judgment for deficiency: Guaranty.

Kasten v. Interstate Casualty Co *73*

Accident insurance: Construction of policy: Exception of poisoning.

Keith, Reed v *672*
Kellett v. Robie *303*

Promise to marry, release of: Excessive damages.

Killen, Webster v *525*
Knopke v. Germantown Farmers' Mutual Ins. Co *289*

Evidence: Instructions as to weight of evidence: Improper remarks by counsel: New trial.

Knowles v. Rogers *231*

Appealable order.

Knutson and wife v. Bostrak and wife *469*

Conveyance by parents on condition of support: Rescission for failure to perform: Remedies: Waiver.

Koetting, Barth v *242*
Kohler v. West Side R. Co *33*

Juror, competency of: Appeal, harmless error: Negligence: Special verdict: Instructions.

Kruczinski and others v. Neuendorf and wife *264, 271*

Cloud on title: Equitable relief: Remedy at law: Pleading: Parties.

La Belle, Stacy v 520
La Crosse, City of, Becker v 414
La Crosse, City of, O'Brien v 421
Lake Superior Terminal & Transfer R. Co., Ray v ... 617
Lampman, Ellis v 81
Land & River Improvement Co., Richards v 625
Laube, Charles Baumbach Co. v 171
Lederer and others v. Rosenthal 235

Admissions in pleading as evidence: Attachment for debt not yet due: Affidavit and undertaking: Nonresidence: Waiver of tort.

Leiby, Richter v 512
Lerdall, Guldemann v 495
Limited Investment Asso. v. Glendale Investment Asso. 54

Vendor and purchaser: Fraud in sale: Election of remedies: Action for money had and received: Review on appeal: Instructions.

Lord, Huguier v 650
Louden, McFarlane v 620

Madison, City of, Tenney v 539
Maloney v. Wauwatosa Park Co 40
Manasse, Fred Miller Brewing Co. v 99
Mayor and Common Council of Ahnapee, The State ex rel. Gericke v 322
Mayor and Common Council of Janesville, McLellan v. 544
McFarlane v. Louden and another 620

Appeal: Evidence: Presumption as to date of deed: Fraudulent conveyance.

McFarlane v. Town of Sullivan 361

Defective highway: Proximate cause.

McLellan v. Mayor and Common Council of the City of Janesville 544

Excise laws: Revocation of license: Appeal: Stay of proceedings.

Meloy v. Peterson 489

Fraudulent representation as to quantity of land: Court and jury.

Menasha Woodenware Co., Schmidt v 300
Methodist Episcopal Church, Moody & Meckelburg Co. v. 49
Miller, Sheboygan Boot & Shoe Co. v 527
Miller Brewing Co. v. Manasse 99
Milwaukee, City of, Ritger v 190
Milwaukee, City of, Vogt v 258
Milwaukee Cold Storage Co. v. Dexter and another 214

Corporations: Fraud by promoters: Brief on appeal

Milwaukee Electric R. & L. Co., Robran v 83
Milwaukee Electric R. & L. Co., Zehren v 83
Moody & Meckelburg Co. v. Trustees of the Methodist Episcopal Church of Port Washington 49

Agency: Lien of materialman: Ratification of contract: Religious corporation:

Moore, Bleiler v 486
Morey v. Racine County 32
Murphy v. Quinn 466

Evidence: Transactions with decedent: Appeal: Finding not against weight of evidence.

Nelson and others v. Jacobs 547

Foreclosure of land contract: Waiver of objection to judgment: Vendor and purchaser: Marketable title.

Neuendorf, Kruczinski v 264, 271
Neumeister, Darling v 426
New Birdsall Co., Trapp v 458
Nicolai, Wilkins v 178
Noth, Rasch v 285

O'Brien v. City of La Crosse 421

Practice: Physical examination of plaintiff in action for personal injuries: Discretion.

Olson v. Olson..... 107

Divorce: Review on appeal: Counterclaim.

Parker, Robertson v..... 652

Parlin & Orendorff Co. v. Angell and another..... 297

Appeal: Verdict supported by evidence.

Peehl and husband v. Bumbalek and another..... 62

Landlord and tenant: Renewal by holding over: Termination by notice.

Pellardis v. Journal Printing Co..... 156

Evidence: Libel: Damages.

Perkins v. Jacobs..... 409

Appeal: Affirmance on failure to prosecute: Damages for delay.

Peterson, Meloy v..... 489

Phillips v. Carver and wife..... 561

Pleading: Demurrer *ore tenus:* Misjoinder of causes of action: Waiver: Specific performance: Election.

Prussian National Ins. Co., Wood v..... 497

Quinn, Murphy v..... 466

Racine County, Morey v..... 32

Racine County, Wentworth v..... 26

Racine Wagon & Carriage Co., Winkler v..... 184

Rambusch, Spence v..... 676

Rasch v. Noth..... 285

Ejectment: Projection of roof.

Ray v. Lake Superior Terminal & Transfer R. Co.... 617

Jury drawn under existing law: Change of law, effect of: Appeal: Separate verdicts as to past and future damages.

Reed v. Keith..... 672

Slander: Punitory damages: Excessive damages, when not apportionable: Appeal.

Rice, Jones v..... 429

Richards v. Land & River Improvement Co..... 625

Appeal, what reviewed: Foreclosure and judgment for deficiency.

Richter v. Leiby and others..... 512

County judge: Estates of decedents: Action by creditors to reach assets not inventoried: Parties.

Ritger v. City of Milwaukee and others..... 190

Municipal corporations: Liability for obstructions in street: Runaway horse: Contributory negligence of driver: Proximate cause.

Roane Iron Co. v. Wisconsin Trust Co..... 273

Constitutional law: Special legislation: Voluntary assignment: Garnishment: Trust company.

Robertson v. Parker..... 652

Judge, personal liability for tort: Criminal jurisdiction of municipal judge: Abandonment.

Robie, Kellett v..... 303
Robinson, Estate of, v. Hodgkin..... 327
Robran v. Milwaukee Electric R. & L. Co..... 83
Rock v. Collins..... 630

Garnishment: Amendment of answer: Waiver: Chattel mortgage by partnership: Fraudulent conveyance.

Rogers, Knowles v..... 231
Rosenow and another v. Gardner..... 358

Res adjudicata: Certificate on appeal.

Rosenthal, Lederer v..... 235
Roszcynialla, In re..... 534
Rundle, Stittgen v..... 78
Ryan, The State ex rel. Heiden v..... 123

Schaefer v. City of Fond du Lac..... 333

Street railways: Liability for injury by defective track: Primary liability: Lessor's liability: City's liability: *Res adjudicata.*

Schmidt (Staeffler, Appellant) v. Menasha Woodenware Co 300

Action for causing death: Survival of right of action.

Schneider v. Chicago, Milwaukee & St. Paul R. Co ... 378

Railroads: Collision at highway crossing: Contributory negligence: Proximate cause: Excessive speed: Statutory liability.

Schneidt, Tiede v 201

Schumaker v. Heinemann and others 251

Special verdict: Submission of issues: Contract of employment: Grounds for terminating: Damages.

Sheboygan Boot & Shoe Co. and others v. Miller 527

Fraudulent conveyance: Evidence of fraud.

Siebrecht v. Hogan 437

Mechanic's lien: Lien of subcontractor: Jury trial: Special verdict: Burden of proof.

Siegel, Field v 605

Slauson v. Goodrich Transportation Co 20

Ejectment: Evidence of title: Deed, reference to plat: Evidence on second trial: Record on appeal.

Spence v. Rambusch 676

Execution: Exemption of abstract books.

Stacy and another v. La Belle 520

Jurisdiction of state courts over contracts by Indians.

State ex rel. Gericke v. Mayor and Common Council of the City of Ahnapee 322

Mandamus: Municipal corporations, duty as to bridges.

State ex rel. Goebel v. Chamberlain 503

Delinquent tax list, publication of in English newspaper.

State ex rel. Heiden v. Ryan 123

Supreme court: Jurisdiction in *habeas corpus*.

Stevens, Fulton v 307

Stittgen v. Rundle 78

Judicial notice: City ordinances: Appeal: Arrest without warrant.

Sullivan, Town of, McFarlane v 361
Swift, Bratt v 579

Tenney v. City of Madison and others 539

Appeals from orders: Dismissal for insufficiency of record: Undertaking, defects cured.

Thompson, Washburn County v 585
Tiede v. Schneidt 201

Injunction, dissolution of: Hearing on motion.

Trapp v. New Birdsall Co. 458

Sale of chattels: Warranty: Evidence: Conditions: Waiver.

Travelers' Insurance Co. v. Fricke 367

Foreign insurance companies: Revocation of licenses: Interest on fees: Equity: Statute of limitations: Estoppel.

Trustees of Methodist Episcopal Church, Moody & Mecklenburg Co. v 49

Vogt v. City of Milwaukee 258

City ordinance fixing hours of labor: Extra pay for extra hours: Estoppel.

Wadhams Oil & Grease Co., Wing v 248
Walker, Dyer v 404
Warder, Bushnell & Glessner Co. v. Angell and another 298

Account stated: Appeal: Verdict sustained: Harmless error.

Washburn County v. Thompson and others 585

County board, power to settle doubtful claims: Bond, consideration for: Pleading defense.

Wauwatosa Park Co., Franey v 40
Wauwatosa Park Co., Maloney v 40
Webster v. Killen and another 525

Ejectment for unoccupied land, against whom maintainable.

Wentworth v. Racine County 26

Construction of statutes: Constitutional law: County boards: Publication of proceedings: *Res adjudicata.*

Western Stove & Mfg. Co., B. Hoffmann Mfg. Co. v 53

West Side R. Co., Kohler v 33

Weyerhaeuser v. Earley 445

Appeal, what will be reviewed: Briefs.

Wilkins v. Nicolai and another 178

Easements: Prescription: Adverse use.

Williams, Kane v 65

Wing and others v. Wadhams Oil & Grease Co 248

Contract of sale: Construction of terms.

Winkler v. Racine Wagon & Carriage Co 184

Master and servant: Damages for wrongful discharge: Burden of proof: Pleading: Appeal.

Wisconsin Trust Co., Roane Iron Co. v 273

Wood v. Prussian National Ins. Co 497

Insurance: Agreement by agent to keep policy renewed.

Yahr v. Joint School District No. 2 of the Towns of Princeton and St. Marie 281

Appeal: Nonsuit: Building contract: Liability of owner for materials: Condition precedent: Waiver.

Zehren v. Milwaukee Electric Railway & Light Co 83

Electric street railways: Country highways: Additional burden: Changing grade.

TABLE

OF

CASES CITED BY THE COURT.

Abbot v. Kalbus, 74 W. 504 - 458
Ablard v. Fitzgerald, 87 W. 516 24
Adams v. Wheeler, 97 Mass. 67 648
Ætna L. Ins. Co. v. McCormick, 20 W. 265 - - - 346
Agnew v. Brall, 124 Ill. 312 - 594
Ahern v. Steele, 115 N. Y. 203 339
Aiken v. Benedict, 39 Barb. 400 . 288
Ala. G. S. R. Co. v. Hill, 90 Ala. 71 - - - - - - - 425
Albert v. State, 66 Md. 325 - 389
Alexander v. Alexander, 104 N. Y. 643 - - - - - 398
Allen v. Charlestown, 111 Mass. 123 - - - - - 153
——— v. Murray, 87 W. 46 - 585
——— v. Perry, 56 W. 178 - 394
Andrews v. C., M. & St. P. R. Co. 96 W. 348 - - 364, 388
Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466 - - 425
Atkins v. Bordman, 20 Pick. 291 - - - - - - - 409
Atkinson v. Goodrich Transp. Co. 60 W. 156 - - - 363
Austin v. Barrows, 41 Conn. 287 - - - - - - - 611
——— v. Vrooman, 128 N. Y. 229 - - - - - - - 659
Averill v. U. S. 14 Ct. Cl. 200 261
Avery v. Judd, 21 W. 262 - 670
——— v. Ryan, 74 W. 599 - 270

Babson v. Rockport, 101 Mass. 93 - - - - - - - - 365
Bacon v. Bacon, 43 W. 197 - 346
Bailey v. New York, 3 Hill, 531 - - - - - - - 420
Baker v. Beach, 15 W. 99 - 555
——— v. German F. Ins. Co. 124 Ind. 490 - - - - - 451
Ballin v. Merchants' Exch. Bank, 89 W. 278 - - - 247
Bank of Augusta v. Earle, 13 Pet. 519 - - - - - 420
Barker v. Knickerbocker L. Ins. Co. 24 W. 630 - - 188
Barndt v. Frederick, 78 W. 1 · 60
Bartlett v. Clough, 94 W. 196 176, 177
——— v. Secor, 56 W. 520 - 559
Bassett v. Warner, 23 W. 673 270
Baumbach Co. v. Laube, 99 W. 171 - - - - - - - 441
Beard v. Hopkinsville, 95 Ky. 239, 28 L. R. A. 402 - - - 16
Beckman v. Beckman, 86 W. 655 - - - - - - - 483
Bell v. McKinney, 63 Miss. 187 659
Bemis v. Arlington, 114 Mass. 509 - - - - - - - 365
Benkard v. Babcock, 27 How. Pr. 391 - - - - - - 396
Bennett v. Child, 19 W. 362 - 394
Bentinck v. Fenn, 12 App. Cas. 659 - - - - - - - 230
Betz v. Brenner, 106 Mich. 87 680
Bishop v. Belle City St. R. Co. 92 W. 139 - - 197, 363, 365
Blake v. Blake, 56 W. 393 - 483
——— v. ———, 75 W. 339 - 346
Bleiler v. Moore, 94 W. 385 - 357
Blewett v. Gaynor, 77 W. 378 350
Block v. Milwaukee St. R. Co. 89 W. 371 - - - - - 465
Blunt v. Walker. 11 W. 334 - 127
Bogie v. Bogie, 35 W. 659 - 320
——— v. ———, 41 W. 209 - 483
Bolton Partners v. Lambert, 41 Ch. Div. 295 - - - 48
Borngesser v. Harrison, 12 W. 544 - - - - - - - 47

Boston v. Worthington, 10 Gray, 496 - - - - - 343
Bound v. W. C. R. Co. 45 W. 543 - - - - - - 14
Brackett v. Barney, 28 N. Y. 333 - - - - - - 321
Bradley v. Fuller, 118 Mass. 239 - - - - - - 610
Bradley Co. v. Paul, 94 W. 488 638
Braem v. Merchants' Nat. Bank, 127 N. Y. 508 - - 612
Bragg v. Gaynor, 85 W. 468 - 352
Bresnahan v. Bresnahan, 46 W. 386 - - - - - - 483
Briggs v. Lewiston & A. H. R. Co. 79 Me. 363 - - - 94
Brill v. Brill, 108 N. Y. 511 - 408
Brooks v. Cotton, 48 N. H. 50 261
——— v. Riding, 46 Ind. 15 - 493
Brosde v. Sanderson, 86 W. 368 658
Brown v. Baraboo, 90 W. 151 394
——— v. Kayser, 60 W. 1 - 65
——— v. Maryland, 12 Wheat. 419 - - - - - - - 522
Brownsville v. Cavazos, 100 U. S. 138 - - - - - 26
Brueshaber v. Hertling, 78 W. 498 - - - - - - - 675
Buckner v. Spaulding, 127 Ind. 229 - - - - - - 162
Bumbalek v. Peehl, 95 W. 127 63
Burford v. Wible, 32 Pa. St. 95 162
Butternut v. O'Malley, 50 W. 329 - - - - - - 595
Button v. Schroyer, 5 W. 598 555

Cahoon v. C. & N. W. R. Co. 85 W. 570 - - - - - 458
Campbell v. Campbell, 37 W. 206 - - - - - - 346
Candrian v. Miller, 98 W. 164 161, 162
Cape Breton Co., *In re*, 29 Ch. Div. 795 - - - - - 230
Carey v. Dyer, 97 W. 554 - 638
Carmody v. Mulrooney, 87 W. 552 - - - - - 183, 559
Carroll's Will, 50 W. 437 - 177
Cass Co. v. Gillett, 100 U. S. 585 - - - - - - 20
Catura v. Kleiner, 95 W. 378 - 622
Cavanagh v. Boston, 139 Mass. 426 - - - - - - 420
C. Gotzian & Co. v. Shakman, 89 W. 52 - - - - - 170
Chadron v. Glover, 43 Neb. 733 425
Chapman v. Polack, 70 Cal. 487 25
Charles Baumbach Co. v. Laube, 99 W. 171 - - - 441
Chase v. M. C. R. Co. 167 Mass. 383 - - - - - - 386
Chicago & N. W. R. Co. v. M., R. & K. E. R. Co. 95 W. 561 89, 99
Church v. Smith, 39 W. 492 - 555
Clark v. Janesville, 10 W. 136 127
Cleveland v. Burnham, 60 W. 16 - - - - - - - 234
——— v. Tripp, 13 R. I. 50 - 153
Clifford v. State, 58 W. 485 - 537
Clowes v. Dickinson, 8 Cow. 328 - - - - - - 396
Cogswell v. Colley, 22 W. 399 395, 396, 397
Cohen v. New York, 113 N. Y. 537 - - - - - - 363
Coldwater v. Tucker, 36 Mich. 474 - - - - - - 419
Collins v. Welch, 58 Iowa, 72 - 594
Colf v. C., St. P., M. & O. R. Co. 87 W. 273 - - - 116
Conhocton Stone Road v. B., N. Y. & E. R. Co. 51 N. Y. 573 339
Conklin v. Boyd, 46 Mich. 56 - 181
Cook v. Barr, 44 N. Y. 156 - 239
——— v. Cook, 56 W. 195 344, 346
——— v. McComb, 98 W. 526 - 395
——— v. Tullis, 18 Wall. 332 - 48
Cooley v. Board of Wardens, 12 How. 318 - - - - 523
Cooper v. Waterloo, 88 W. 433 341
Corwith v. State Bank, 18 W. 560 - - - - - - 105
Coulter v. Am. M. U. Exp. Co. 56 N. Y. 585 - - - - 648
Cox v. St. Louis, 11 Mo. 431 - 80
Cribb v. Morse, 77 W. 322 - 638
Croft v. Bunster, 9 W. 503 - 102
Cromwell v. Sac Co. 94 U. S. 351 - - - - - - 32
Crook v. First Nat. Bank, 83 W. 32 - - - - - - 48
Crow Dog, *Ex parte*, 109 U. S. 556 - - - - - - 522
Cruger, *In re*, 84 N. Y. 619 - 139
Crugom v. Crugom, 64 W. 253 344, 346, 348
Culbertson v. Fulton, 127 Ill. 30 - - - - - - 16
Cummings v. Nat. F. Co. 60 W. 603 - - - - - - 403
Cunningham v. Cambridge Sav. Bank, 138 Mass. 480 - 339
Curran v. A. H. Stange Co. 98 W. 599 - - - - - 296

Curry v. C. & N. W. R. Co. 43 W. 665 - - - - - - 387
Curtis v. C. & N. W. R. Co. 95 W. 460 - - - - - - 116
——— v. Eastern R. Co. 98 Mass. 428 - - - - - 181

Dalay v. Savage, 145 Mass. 38 339, 340
Danley v. Williams, 16 W. 581 188
Darcey v. Farmers' L. Co. 87 W. 245 - - - - - - 117
Davenport v. Stephens, 95 W. 459 - - - - - - - 270
Davidson v. New Orleans, 96 U. S. 97 - - 151, 152, 153
Daviess Co. v. Dickinson, 117 U. S. 657 - - - - - 11
Davis v. C., M. & St. P. R. Co. 93 W. 470 - - - - - 388
Davis L. Co. v. Scottish U. & N. Ins. Co. 94 W. 472 - - 501
Dawe v. Morris, 149 Mass. 188 610
Day v. Buckingham, 87 W. 219 356
——— v. Mertlock, 87 W. 577 346
Deery v. McClintock, 31 W. 195 - - - - - - - 603
Deisenrieter v. Kraus-Merkel M. Co. 97 W. 279 - - 364, 388
Delong v. Delong, 56 W. 514 - 483
Denner v. C., M. & St. P. R. Co. 57 Wis. 218 - - - 270
Densmore Oil Co. v. Densmore, 64 Pa. St. 49 - - - - - 229
Detroit City R. Co. v. Mills, 85 Mich. 634 - - - - - 89
Dewey v. Fifield, 2 W. 73 - 174
Dietz v. Neenah, 91 W. 422 142, 143, 149
Donahue v. Klassner, 22 Mich. 252 - - - - - - - 26
Doon v. Cummins, 142 U. S. 366 - - - - - - - 11
Dorsey v. Phillips & C. Const. Co. 42 W. 583 - - - - 121
Douglas Co. v. Walbridge, 38 W. 179 - - - - - - 14
Dowling v. Nuebling, 97 W. 350 - - - - - - - 340
Draper v. Jackson, 16 Mass. 480 - - - - - - - 393
Dreher v. Fitchburg, 22 W. 675 366
Drexler v. Tyrrell, 15 Nev. 114 106
Dudley v. Briggs, 141 Mass. 582 610
Dugan v. C., St. P., M. & O. R. Co. 85 W. 614 - - - - 387
Duthie v. Washburn, 87 W. 231 - - - - - - - 118

Eager, *In re*, 46 N. Y. 100 - 139
Earles v. Wells, 94 W. 298 10, 15, 16
Early v. Standard L. & Acc. Ins. Co. 71 N. W. Rep. 500 - 77
Eckart, *In re*, 85 W. 681 - - 536
Edwards v. Edwards, 22 Ill. 121 - - - - - - - 26
Eichert v. Schaffer, 161 Pa. St. 519 - - - - - - - 26
Eldred, *In re*, 46 W. 530 - - 536
Ellerbe v. Barney, 119 Mo. 632 316
Ellis v. N. P. R. Co. 77 W. 114 270
Ellsworth v. Cordrey, 63 Iowa, 675 - - - - - - - 667
Erkenbrach v. Erkenbrach, 96 N. Y. 456 - - - - - 346
Erlanger v. New Sombrero P. Co. 3 App. Cas. 1218 - - 230
Eureka S. H. Co. v. Sloteman, 67 W. 126 - - - - - 355
Eviston v. Cramer, 57 W. 570 676

Farmers' L. & T. Co. v. B. & M. Tel. Co. 109 N. Y. 342 - 397
Farmers' Mut. F. Ins. Co. v. Crampton, 43 Mich. 421 - 294
Farr v. Trustees of Grand Lodge, 83 W. 446 - - - 393
Farrington v. Wilson, 29 W. 383 - - - - - - - 522
Fellows v. Gilhuber, 82 W. 639 337, 340
Fero v. Ruscoe, 4 N. Y. 162 - 162
Fidelity & Casualty Co. v. Waterman, 161 Ill. 632 - 77
Finch v. Houghton, 19 W. 149 330
Findlay v. McAllister, 113 U. S. 104 - - - - - - - 612
Fire Department of Milwaukee v. Helfenstein, 16 W. 136 - - - 372, 374, 375
Fire Department of Oshkosh v. Tuttle, 48 W. 91 - - 375
——— v. ———, 50 W. 552 - 375
First Nat. Bank v. Agnew, 45 W. 131 - - - - - - 555
Fisher, *In re*, 15 W. 511 - - 515
Fisk v. Brunette, 30 W. 102 - 667
Flagg v. Hudson, 142 Mass. 288 363
Flaherty v. Harrison, 98 W. 559 - - - - - - - 458
Flanders v. Merrimac, 44 W. 621 - - - - - 396, 397
Follett v. Heath, 15 W. 601 - 637
Fountain Spring P. Co. v. Roberts, 92 W. 345 54, 57, 215, 226
Fox v. Zimmermann, 77 W. 414 - - - - - - - 669

Franey v. Warner, 96 W. 222 - 45, 47, 57, 58, 215, 226, 229
Frazier v. Turner, 76 W. 562 - 658
French, *In re*, 81 W. 597 - 536
Friend Bros. Clothing Co. v. Hulbert, 98 W. 183 - - 45
Fromer & Co. v. Stanley, 95 W. 56 - - - - - 609
Fryer v. Warne, 29 W. 511 - 182
Fuller v. Griffith, 91 Iowa, 632 624

Gaston v. Babcock, 6 W. 503 - 515
Gates v. Parmly, 93 W. 295 - 561
Gaynor v. Blewett, 86 W. 399 72, 630
Geisinger v. Beyl, 71 W. 358 - 667
German-Am. Bank v. Butler-M. Co. 87 W. 467 - - - 167
German Bank v. Leyser, 50 W. 258 - - - - - 517, 519
Gho v. Julles, 1 Wash. Ter. (N. S.), 325 - - - - - 524
Gibbons v. Ellis, 83 W. 434 - 321
Gilbert v. Dutruit, 91 W. 661 128
Gilman v. Philadelphia, 8 Wall. 713 - - - - - 523
Gilmore v. Hentig, 33 Kan. 156 152
Giovanni, The, v. Philadelphia, 59 Fed. Rep. 308 - - 420
Glover v. Wells & M. Grain Co. 93 W. 13 - - - 542
Godfroy v. Scott, 70 Ind. 259 524
Gordon v. Brewster, 7 W. 355 188
Gores v. Graff, 77 W. 174 - 301
Gott v. Brigham, 41 Mich. 227 538
Gotzian & Co. v. Shakman, 89 W. 52 - - - - - - 170
Gould v. Sullivan, 84 W. 665 - 561
Gowan v. Hanson, 55 W. 344 240
Grace v. Newbre, 31 W. 19 - 636
Graham, *In re*, 74 W. 450 - 536
———, 76 W. 366 - - - 536
———, 138 U. S. 461 - - 536
Grant v. Law, 29 W. 99 - - 45
Graves v. Battle Creek, 95 Mich. 266 - - - - - 425
Green Bay & M. Canal Co. v. Hewitt, 62 W. 316 - - 26
Greenblatt v. Hermann, 144 N. Y. 13 - - - - - 559
Greene v. Kimble, 6 Blackf. 552 - - - - - - 610
Greene & Button Co. v. Van Vechten, 63 W. 16 - - 488
Groesbeck v. C., M. & St. P. R. Co. 93 W. 505 - - 386, 387
Grottkau v. State, 70 W. 472 537
Groundwater v. Washington, 92 W. 61 - - - - - 465
Grove v. Van Duyn, 44 N. J. Law, 654 - - - - - 657
Gullickson v. Madsen, 87 W. 23 - - - - - - - 270
Guthrie v. Philadelphia, 73 Fed. Rep. 688 - - - 421

Haetsch v. C. & N. W. R. Co. 87 W. 304 - - - - - 385
Hagar v. Reclamation Dist. 111 U. S. 701 - - 150, 155
Hage v. Campbell, 78 W. 573 637
Hagenah v. Geffert, 73 W. 636 572, 629
Hall v. Baker, 74 W. 118 - 14
——— v. Eaton, 25 Vt. 458 - 612
Hammond v. Carter, 161 Ill. 621 - - - - - - 26
——— v. Zehner, 23 Barb. 473 183
Hansen v. C., M. & St. P. R. Co. 83 W. 631 - - - 385
Hanson v. Globe Newspaper Co. 159 Mass. 295 - - - 160
Hardy v. Milwaukee St. R. Co. 89 W. 187 - - - - - 465
Harrington v. Port Huron, 86 Mich. 46 - - - - - 288
——— v. Smith, 28 W. 43 - 128
Hart v. Citizens' Ins. Co. 86 W. 77 - - - - - - 532
——— v. West Side R. Co. 86 W. 483 - - - - - - 37
Hartstein v. Hartstein, 74 W. 1 483
Hatfield v. St. P. & D. R. Co. 33 Minn. 130 - - - - 425
Hawley v. Tesch, 72 W. 299 - 270
——— v. ———, 88 W. 213 - 270
Hayes v. Douglas Co. 92 W. 429 - - 129, 131, 137, 138
——— v. Harmony Grove Cemetery, 108 Mass. 400 - 559
Hazen v. West Superior L. Co. 91 W. 208 - - - 119, 121
Heath v. Frackleton, 20 W. 320 - - - - - - 47
Hebard v. Ashland Co. 55 W. 145 - - - - - - 15
Hebgen v. Koeffler, 97 W. 313 54, 57, 226
Hedderly v. Johnson, 42 Minn. 443 - - - - - - 560
Hedges v. Dixon Co. 150 U. S. 182 - - - - - - 11
Henderson v. Mayor of New York, 92 U. S. 259 - - 523

Hendricks v. Goodrich, 15 W. 679 - - - - - - 45
Hewitt v. Wis. River L. Co. 81 W. 546 - - - - - - 26
Higbee v. Westlake, 14 N. Y. 281 - - - - - - - 396
Hiles v. Hanover F. Ins. Co. 65 W. 585 - - - - - 453
Hinz v. Van Dusen, 95 W. 503 247
Hixon v. Oneida Co. 82 W. 515 - - - - - 396, 398
Hobart v. Milwaukee City R. Co. 27 W. 194 - 88, 90, 91, 97
Hoffman & B. Mfg. Co. v. Burdick, 95 W. 342 - - - 542
Hoile v. Bailey, 58 W. 434 - 623
Hollenback v. Shoyer, 16 W. 499 - - - - - - - 45
Holmes v. Carley, 31 N. Y. 289 137
——— v. Jones, 121 N. Y. 461 162
Holton v. Burton, 78 W. 321 - 163, 168, 169
Holum v. C., M. & St. P. R. Co. 80 W. 299 - - - - - 387
Hooker v. Greene, 50 W. 271 - 105
Horn v. C. & N. W. R. Co. 38 W. 463 - - - - - - - 80
Houfe v. Fulton, 29 W. 296 365, 366
Howard v. Daly, 61 N. Y. 362 187
——— v. Smith, 91 Tex. 8 - 16
Hubbard v. Haley, 96 W. 578 72, 239, 240
Hyslip v. French, 52 W. 516 - 45

Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 300 - - 127
Ingraham v. Ward, 56 Kan. 550 - - - - - - - 524
Inter-State C. R. T. R. Co. v. Early, 46 Kan. 197 - - 94
Irvine v. Wood, 51 N. Y. 224 - 339
Irving v. Campbell, 121 N. Y. 353 - - - - - - - 561

Jackson v. Bellevieu, 30 W. 250 - - - - 197, 363, 365
——— v. State, 91 W. 253 - 299
Jameson v. Maxcy, 91 W. 563 166
Jaynes v. Omaha St. R. Co. (Neb.), 74 N. W. Rep. 67 - 89
Jennings v. Lyons, 39 W. 557 187
Jesup v. City Bank, 15 W. 604 105
John R. Davis L. Co. v. Scottish U. & N. Ins. Co. 94 W. 472 501
Johnson v. Borson, 77 W. 593 408
Jones v. Billstein, 28 W. 221 - 269
——— v. Commercial Bank, 5 How. (Miss.), 43 - - - 211
Jones v. Graham, 80 W. 11 269, 271
——— v. Sutherland, 91 W. 587 121

Kaehler v. Dobberpuhl, 60 W. 261 - - - - - - 48
Kamp v. Kamp, 59 N. Y. 212 347
Kane v. Williams, 99 W. 65 - 629
Kelley v. Whitney, 45 W. 110 102
Kellogg v. Oshkosh, 14 W. 623 508
Kempster v. Evans, 81 W. 247 346
Kentucky Railroad Tax Cases, 115 U. S. 331 - - - 151
Kentzler v. Am. Mut. Acc. Asso. 88 W. 596 - - - 451
Ker v. Illinois, 119 U. S. 436 - 538
Ketchum v. Stout, 20 Ohio, 453 - - - - - - - 494
Ketchum v. Walsworth, 5 W. 95 - - - - - - - 393
Ke-tuc-e-mun-guah v. McClure, 122 Ind. 541 - - 524
Keystone L. Co. v. Bayfield, 94 W. 494 - - - 13, 15
Kickland v. Menasha W. W. Co. 68 W. 34 - - - - 52
Kilbourn Lodge v. Kilbourn, 74 W. 452 - - - - - 270
Kimball v. Harman, 34 Md. 407 - - - - - - - 612
——— v. Howard F. Ins. Co. 8 Gray, 33 - - - 451
Klatt v. N. C. Foster L. Co. 97 W. 641 - - - - - - 39
Klous v. Hennessey, 13 R. I. 332 - - - - - - 611
Knauss v. Brua, 107 Pa. St. 85 339
Knoll v. State, 55 W. 256 - 537
Kollock v. Scribner, 98 W. 104 - - - - - - - 65
Kruczinski v. Neuendorf, 99 W. 264 - - - - - - 271
Kucera v. Merrill L. Co. 91 W. 637 - - - - - - 118

La Coursier v. Russell, 82 W. 265 - - - - - - - 188
Ladywell M. Co. v. Brookes, 35 Ch. Div. 400 - - - 230
Laird v. Giffin, 84 W. 286 396, 398
Lake Co. v. Graham, 130 U. S. 674 - - - - - 16, 17
——— v. Rollins, 130 U. S. 662 16
Lamb v. Stone, 11 Pick. 527 - 610
Lamberton v. Pereles, 87 W. 449 - - - - - - - 270
Lampman v. Van Alstyne, 94 W. 417 - - - - - 182, 559

Landon v. Burke, 36 W. 378 - 555
Langhoff v. M. & P. du C. R. Co. 19 W. 489 - - - 386
——— v. ———, 23 W. 43 - 386
Lanpher v. Clark, 149 N. Y. 472 - - - - - - 162
Lardner v. Williams, 98 W. 514 - - - - - - 71
Larson v. Aultman & T. Co. 86 W. 281 - - - - - 375
Lathrop v. Snyder, 16 W. 293 241
Lee v. Simmons, 65 W. 526 - 609
Leisy v. Hardin, 135 U. S. 100 523
Lent v. Tillson, 140 U. S. 316 153
Lentz v. Teutonia F. Ins. Co. 96 Mich. 445 - - - - - 533
Leprell v. Kleinschmidt, 112 N. Y. 364 - - - - - 288
Lester v. Jackson, 69 Miss. 887 420
Lewis v. Am. S. & L. Asso. 98 W. 203 - - - - - 372, 375
Line v. State *ex rel.* Louder, 131 Ind. 468 - - - - 518
Litchfield v. Ballou, 114 U. S. 190 - - - - - - 15
Littlefield v. William Bergenthal Co. 87 W. 394 - - 188
Littleton v. Richardson, 34 N. H. 179 - - - - - - 343
Loeb v. O'Brien, 93 W. 249 - 652
Louis F. Fromer & Co. v. Stanley, 95 W. 56 - - - 609
Lowell v. B. & L. R. Co. 23 Pick. 24 - - - - - - 343
Lueck v. Heisler, 87 W. 644 - 658
Luske v. Hotchkiss, 37 Conn. 219 - - - - - - 261
Lynch v. Divan, 66 W. 490 - 328, 330, 331
——— v. E., L. F. & M. R. Co. 57 W. 430 - - - 14, 20

Magee v. Miss. River L. Co. 95 W. 377 - - - - - - 622
Mahon v. Justice, 127 U. S. 700 538
Marble v. Worcester, 4 Gray, 395 - - - - - - 365
Marsh v. Waupaca Co. 38 W. 250 - - - - - - 269
Martineau v. McCollum, 3 Pin. 455 - - - - - - 102
Massing v. Ames, 37 W. 651 - 137
Masterson v. Munro, 105 Cal. 431 - - - - - - 25
Mayfield, *In re*, 141 U. S. 107 - 523
Mayor v. Moran, 44 Mich. 602 419
Maxwell v. Simonton, 81 W. 635 - - - - - - 166
McCarthy v. New York, 96 N. Y. 1 - - - - - - 261
McCourt v. Eckstein, 22 W. 153 - - - - - - 287
McCrary Bros. v. Bristol B. & T. Co. 97 Tenn. 469 - - 443
McDermott v. Jackson, 97 W. 64 - - - - - - - 501
McDonald v. Ross-Lewin, 29 Hun. 87 - - - - - 318
McDonogh's Ex'rs v. Murdock, 15 How. 367 - - - - 420
McFarlane v. Sullivan, 99 W. 361 - - - - 197, 388
McGregor v. Pearson, 51 W. 122 - - - - - - 355
McKinney v. C. & N. W. R. Co. 87 W. 282 - - - 386
McMahon v. McGraw, 26 W. 614 - - - - - - 667
McMillen v. Anderson, 95 U. S. 37 - - - - - - 151, 154
McNamara v. Clintonville, 62 W. 211 - - - - - - 466
Mead v. Nelson, 52 W. 402 - 561
Mechanics' Nat. Bank v. H. C. Burnet M. Co. 32 N. J. Eq. 236 - - - - - - 662
Meggett v. Eau Claire, 81 W. 326 - - 143, 149, 154, 156
Mellen v. Hamilton F. Ins. Co. 17 N. Y. 609 - - - - 451
——— v. Mellen, 137 N. Y. 606 397
Melms v. Pfister, 59 W. 186 - 271
Menneiley v. Employers' L. Ass. Corp. 148 N. Y. 596 - 77
Mercer v. Wright, 3 W. 645 - 585
Meyer v. Garthwaite, 92 W. 571 - - - - - - 270
Milburn, *In re*, 59 W. 24 - 536
Miller v. Garlock, 8 Barb. 153 184
——— v. U. S. 14 Ct. Cl. 200 - 263
Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 474 - - 363
Minnesota L. & T. Co. v. Beebe, 40 Minn. 7 - - - - 275
Minturn v. Seymour, 4 Johns. Ch. 173 - - - - - 211
Mobile Co. v. Kimball, 102 U. S. 691 - - - - - - 523
Moody v. Burton, 27 Me. 427 610
Morgan v. Bishop, 56 W. 284 - 561
Morley v. Dunbar, 24 W. 185 - 585
Morris v. Whitcher, 20 N. Y. 41 - - - - - - 493
Morrison v. Koch, 32 W. 254 - 609
Moulton v. Sanford, 51 Me. 127 - - - - - - 365

Murdock v. Warwick, 4 Gray, 178 - - - - - - 365
Murphey v. Weil, 89 W. 146 - 87
Murphy v. Bolger Bros. 60 Vt. 723 - - - - - - 288
Murray v. Harway, 56 N. Y. 344 - - - - - - 561

National Trust Co. v. Gleason, 77 N. Y. 400 - - - - 59
Nelson v. D., S. S. & A. R. Co. 88 W. 396 - - - - - 385
New Era L. Asso. v. Rossiter, 132 Pa. St. 314 - - - 318
New York, *In re*, 99 N. Y. 569 420
New York v. Bailey, 2 Denio, 433 - - - - - - 420
Nichols v. Ann Arbor & Y. St. R. Co. 87 Mich. 361 - 94
Nicholson v. Coleman, 90 W. 639 - - - - - - 652
Nolan v. M., L. S. & W. R. Co. 91 W. 21 - - - - - 387
Nugent v. B., C. & M. R. Co. 80 Me. 62 - - - - - 339

O'Dell v. Rogers, 44 W. 136 - 271
Ogden v. Glidden, 9 W. 46 - 127
Ohlert v. Alderson, 86 W. 433 489, 492, 493
Olson v. Solveson, 71 W. 663 - 299
O'Reilley v. Kingston, 114 N. Y. 441 - - - - - - 139
Orr v. Box, 23 Minn. 487 - 680
Orth v. Milwaukee, 59 W. 336 327
Otis v. Janesville, 47 W. 422 - 197
Owens v. K. C., St. J. & C. B. R. Co. 95 Mo. 169 - - - 425

Page v. Parker, 43 N. H. 363 - 612
Paine v. Benton, 32 W. 491 - 638
——— v. Eastern R. Co. 91 W. 340 - - - - 116, 120, 122
Patterson v. Wright, 64 W. 289 - - - - - - 609
Patzack v. Von Gerichten, 10 Mo. App. 424 - - - 659
Paul v. Travelers' Ins. Co. 112 N. Y. 472 - - - - 77
Paulsen v. Portland, 149 U. S. 30 - - - - - - - 152
Penn. R. Co. v. Montgomery Co. P. R. Co. 167 Pa. St. 62 - 97
People v. Kelley, 79 Mich. 320 539
——— v. Ketchum, 73 Cal. 635 524
——— v. Meservey, 76 Mich. 223 - - - - - - 539
——— v. Safford, 5 Denio, 112 648
People *ex rel.* Att'y Gen. v. Utica Ins. Co. 15 Johns. 379 127
——— McConville v. Hills, 1 Lans. 202 - - - - - 662
Peterson v. Sherry L. Co. 90 W. 83 - - - - - - 121
Pettigrew v. Evansville, 25 W. 223 - - - - - - 182
Pettit v. May, 34 W. 666 - 80
Phelan v. Fitzpatrick, 84 W. 240 - - - - - 623-624
Phillips v. Albany, 28 W. 340 14
Pickett v. Pac. M. L. Ins. Co. 144 Pa. St. 79 - - - 77
Pier v. Fond du Lac, 38 W. 470 270
Pierstoff v. Jorges, 86 W. 128 270
Pikulik, *In re*, 81 W. 158 - 536
Piper v. C., M. & St. P. R. Co. 77 W. 247 - - - 378, 386
Pittsburg M. Co. v. Spooner, 74 W. 307 - - - 215, 226
Place v. Minster, 65 N. Y. 89 - 612
Platteville v. G. & S. W. R. Co. 43 W. 493 - - - - - 14
Plum v. Fond du Lac, 51 W. 393 - - - - - - 175
Pollock v. Farmers' L. & T. Co. 157 U. S. 429 - - - 377
——— v. ———, 158 U. S. 601 377
Pomeroy v. Heddles, 95 W. 455 622
Pool v. Milwaukee M. Ins. Co. 94 W. 447 - - - - - 36
Porath v. State, 90 W. 537 - 537
Port Jervis v. First Nat. Bank, 96 N. Y. 550 - - 343
Powell v. Ashland I. & S. Co. 98 W. 35 - - - 118, 456
Pratt v. Eby, 67 Pa. St. 396 - 560
——— v. Pratt, 2 Pin. 398 - 241
Prescott v. White, 21 Pick. 342 183
Price v. Hudson, 125 Ill. 284 - 321
Prideaux v. Mineral Point, 43 W. 513 - - - - - - 197
Prince v. Quincy, 105 Ill. 138 16
Pringle v. Dunn, 37 W. 449 - 623
Protection L. Ins. Co., *In re*, 9 Biss. 188 - - - - - 317

Railway Co. v. Dobbins, 60 Ark. 485 - - - - - 425
Ramsay v. Davis, 20 W. 31 - 411
Randles v. Randles, 67 Ind. 434 518
Rathke v. Gardner, 134 Mass. 14 - - - - - - - 181
Raymond v. Keseberg, 91 W. 195 - - - - - - 465
Regan v. C., M. & St. P. R. Co. 51 W. 599 - - - - 301

Reichart v. Wilhelm, 83 Iowa, 510 - - - - - - 321
Richards v. State, 82 W. 172 - 647
Richardson v. Travelers' Ins. Co. 46 Fed. Rep. 843 - - 77
Richmond & D. R. Co. v. Childress, 82 Ga. 719 - - - 425
Robbins v. Chicago, 4 Wall. 657 - - - - - - 343
Roberts v. Jackson, 1 Wend. 478 - - - - - - 321
——— v. Wis. Tel. Co. 77 W. 592 - - - - - - 363
Rogers v. Shove, 98 W. 271 - 104
——— v. Tennant, 45 Cal. 184 211
Rollins v. State, 59 W. 55 - 537
Rooker v. Perkins, 14 W. 79 - 559
Root v. McFerrin, 75 Am. Dec. 49 - - - - - - - 269
Rosenberg, *In re*, 90 W. 581 - 536
Ross v. Wood, 70 N. Y. 8 - 612
Rowell v. Lowell, 7 Gray, 100 365
Ryan v. Outagamie Co. 80 W. 336 - - - - - - 26, 30
——— v. Rockford Ins. Co. 77 W. 611 - - - - - - 39
——— v. Schwartz, 94 W. 404 270

Salter v. Hilgen, 40 W. 363 - 346
Salzer v. Milwaukee, 97 W. 471 363
Scannal v. Cambridge, 163 Mass. 91 - - - - 200, 365
Schenley v. Pittsburgh, 104 Pa. St. 472 - - - - - 25
Scheuber v. Held. 47 W. 340 - 559
Schilling v. C., M. & St. P. R. Co. 71 W. 255 - - - 385
Schillinger v. Verona, 85 W. 599 - - - - - - - 365
——— v. ———, 96 W. 456 - 197
Schlimgen v. C., M. & St. P. R. Co. 90 W. 194 - - - 385
Schmolze v. C., M. & St. P. R. Co. 83 W. 659 - - 385–386
Schuster, *In re*, 82 W. 610 - 536
Second Nat. Bank v. Merrill, 81 W. 142 - - - - - 247
Seefeld v. C., M. & St. P. R. Co. 67 W. 96 - - - - - 385
Sexton v. Rhames, 13 W. 99 - 23
Seymour v. De Lancey, 1 Hopk. Ch. 436 - - - - 561
Shabanaw v. C. C. Thompson & W. Co. 80 W. 621 - - 356
Shackett v. Peoples' Mut. Ben. Soc. 107 Mich. 65 - - - 533
Shaver v. Ingham, 58 Mich. 649 - - - - - - 255
Sheldon v. Davidson, 85 W. 141 - - - - - - - 609
Shepard v. M. P. R. Co. 85 Mo. 629 - - - - - - 425
Sheridan v. New York, 68 N. Y. 30 - - - - - - 106
Sherman v. Bemis, 58 W. 343 526
Sherry v. Frecking, 4 Duer, 452 - - - - - - 288
Shriver v. Shriver, 36 N. Y. 576 561
Sidekum v. W., St. L. & P. R. Co. 93 Mo. 400 - - - 425
Sizer v. Quinlan, 82 W. 390 - 408
Slocum v. Bracy, 55 Minn. 249 493
——— v. Carlton, 2 Pin. 203 - 411
Smith v. C., M. & St. P. R. Co. 83 W. 280 - - - - - 270
——— v. Dawley, 92 Iowa. 312 647
——— v. Evans, 6 Bin. 102 - 493
——— v. Lewis, 20 W. 350 - 670
——— v. Miller, 11 Gray. 145 183
——— v. Schreiner, 86 W. 19 518
——— v. Sherry, 54 W. 114 30, 270
——— v. U. S. 151 U. S. 50 - 523
——— v. Zimmerman, 85 W. 542 - - - - - - - 270
South Bend C. P. Co. v. George C. Cribb Co. 97 W. 230 - 281
Southern P. R. Co. v. Seley, 152 U. S. 145 - - - 122
Spencer v. Merchant, 125 U. S. 345 - - - - - 150, 153
Spies v. People, 122 Ill. 1 - 36
Springfield v. Sale, 127 Ill. 360 140
Staff, *In re*, 68 W. 285 - - 538
State v. Comm'rs of Streets & Sewers, 38 N. J. Law, 195 - - - - - - 140
——— v. Doxtater, 47 W. 278 524
——— v. Harris, 47 W. 298 - 524
——— v. Lockwood, 43 W. 403 538
——— v. U. S. Mut. Acc. Asso. 69 W. 76 - - - - - 377
——— v. Vogel, 22 W. 471 - 538
State *ex rel.* Att'y Gen. v. Cunningham, 81 W. 440 - 326
——— Brown v. Fitzgerald, 51 Minn. 534 - - - - - 538
——— C., M. & St. P. R. Co. v. Blackstone, 63 W. 362 - 18
——— Comstock v. Joint Sch. Dist. No. 1, 65 W. 637 - - 326
——— Cothren v. Lean, 9 W. 279 - - - - - - 30
——— Drake v. Doyle, 40 W. 175 - - - - - - 371
——— Dunn v. Noyes, 87 W. 340 - - - - - - 536

State *ex rel.* G. B. & M. R. Co. v. Jennings, 48 W. 549 - 15
——— Heiden v. Ryan, 99 W. 123 - - - - - - 536
——— Henshall v. Ludington, 33 W. 107 - - - - - 374
——— M., T. & W. R. Co. v. Common Council of Tomahawk, 96 W. 73 - 2, 10, 14, 19, 20
——— Sanderson v. Mann, 76 W. 475 - - - - - - 377
——— Winslow v. Mt. Pleasant, 16 W. 613 - - - 327
——— Wolff v. Board of Sup'rs of Sheboygan Co. 29 W. 84 326
State Railroad Tax Cases, 92 U. S. 575 - - - - - 151
Stearns v. Merchants' Bank, 53 Pa. St. 490 - - - 648
Stein v. Benedict, 83 W. 604 270
Stephenson v. Duncan, 73 W. 404 - - - - - - 121
Stevens v. Gaylord, 11 Mass. 256 - - - - - - 330
Stewart v. Stewart, 41 W. 624 468
Stokes v. Rodman, 5 R. I. 405 524
Strudgeon v. Sand Beach, 107 Mich. 496 - - - - - 425
Stuart v. Allen, 45 W. 158 - 234
Superior C. L. Co. v. Nichols, 81 W. 656 - - - - 555
Sutton v. C., St. P., M. & O. R. Co. 98 W. 157 - - - 294
Swann v. Rary, 3 Blackf. 298 162
Swartzel v. Rogers, 3 Kan. 374 524
Sweet v. Davis, 90 W. 409 - 411
——— v. Ohio C. Co. 78 W. 127 121
Swords v. Edgar, 59 N. Y. 28 339

Tabor v. Armstrong, 9 Colo. 285 - - - - - - 442
Tarbell v. Jewett, 129 Mass. 457 - - - - - - 331
Teegarden v. Racine, 56 W. 545 - - - - - - 136
Teetshorn v. Hull, 30 W. 162 572
Templeton v. Graves, 59 W. 95 - - - - - - - - 675
Tenney v. Lenz, 16 W. 566 - 374
Terre Haute & I. R. Co. v. Brunker, 128 Ind. 542 - - 425
Thomas v. Mitchell, 27 W. 414 446
Thompson v. Blanchard, 4 N. Y. 303 - - - - - - 648
——— v. E. P. Allis Co. 89 W. 523 - - - - - - - 387
——— v. Jackson, 93 Iowa, 376 658
——— v. Milwaukee, 69 W. 492 174
Titus v. Northbridge, 97 Mass. 258 - - - - - - - 199
Toomey v. Kay, 62 W. 106 - 559
Topping v. St. Lawrence, 86 W. 526 - - - - - 301, 302
Toutloff v. Green Bay, 91 W. 490 - - - - - - - 341
Travelers' Ins. Co. v. Dunlap, 160 Ill. 642 - - - - - 77
——— v. Fricke, 94 W. 258 314, 370
——— v. Patten, 98 Ind. 209 669, 670
Treat v. Hiles, 81 W. 280 - 256
Trester v. Sheboygan, 87 W. 496 - - - - - 417, 420
Truesdell v. Combs, 33 Ohio St. 186 - - - - - - 659
Trustees of Kilbourn Lodge v. Kilbourn, 74 W. 452 - - 270
Tyson v. Tyson, 94 W. 225 - 542

U. S. v. Forty-three Gallons of Whiskey, 93 U. S. 188 - - 522
——— v. Holliday, 3 Wall. 407 522
——— v. Kagama, 118 U. S. 383 - - - - - - - 524
——— v. Mayrand, 154 U. S. 552 - - - - - - - 522
U. S. *ex rel.* Boynton v. Blaine, 139 U. S. 306 - - - 326
——— Dunlap v. Black, 128 U. S. 40 - - - - - - - 326
——— Redfield v. Windom, 137 U. S. 636 - - - 326

Vanderpool v. State, 34 Ark. 174 - - - - - - - 659
Vassau v. Thompson, 46 W. 345 629
Voshmik v. Urquhart, 91 W. 513 - - - - - - - 637
Vrooman v. Jackson, 6 Hun, 326 - - - - - - - 288

Wakeley v. Nicholas, 16 W. 588 - - - - - 503, 508
Walker v. Backus Heating Co. 97 W. 160 - - - - 211, 212
Walsh, *In re*, 37 Neb. 454 - 539
Ward, *In re*, 52 N. Y. 397 - 137
Ward v. Clark, 6 W. 509 - 104
Warner v. Benjamin, 89 W. 296 - - - - - - - - 609
——— v. Knox, 50 W. 429 - 149
Warren v. Landry, 74 W. 151 48
Watson v. M. & M. R. Co. 57 W. 339 - - - - - - - 270
Way, *In re*, 41 Mich. 299 - 80
Weart v. Rose, 16 N. J. Eq. 290 494
Webb v. Chisolm, 24 S. C. 487 559

Weber v. Illing, 66 W. 79 - 638
Webster-Glover L. & M. Co. v. St. Croix Co. 71 W. 317 396, 397
Weed v. Burt, 78 N. Y. 191 - 187
——— v. Page, 7 W. 503 - 45
Welch v. Sackett, 12 W. 243 - 320
Wellington v. Small, 3 Cush. 145 - - - - - - 610
Wentworth v. Racine County, 99 W. 26 - - - 32, 33
Westmoreland v. Preferred Acc. Ins. Co. 75 Fed. Rep. 244 - - - - - - 78
——— v. U. S. 155 U. S. 545 - 523
Wetzler v. Duffy, 78 W. 170 - 428
Whaley v. Jarrett, 69 W. 613 408
White v. Chapin, 12 Allen, 516 181
——— v. Milwaukee City R. Co. 61 W. 537 - - - 424
Wickham v. C. & N. W. R. Co. 95 W. 26 - - - 387
Wilkins v. Nicolai, 99 W. 178 559
Wille v. Bartz, 88 W. 424 - 408
Willer v. Bergenthal, 50 W. 474 - - - - - - 176
Williams v. C., M. & St. P. R. Co. 64 W. 1 - - - - 385
——— v. Hathaway, 19 Pick. 387 - - - - - - 493
Wilson, *In re*, 140 U. S. 575 - 523
Winner v. Hoyt, 66 W. 227 - 166
Winship v. Bass, 12 Mass. 199 330
Wirth v. Bartell, 89 W. 594 48, 396, 398
Wis. River Imp. Co. v. Lyons, 30 W. 61 - - - - 446
Witbeck v. Waine, 16 N. Y. 532 - - - - - - 493
Woodward v. C. & N. W. R. Co. 23 W. 400 - - - 303
Worcester v. Georgia, 6 Pet. 515 - - - - - - 522
Zander v. Valentine Blatz B. Co. 89 W. 164 - - - 287
——— v. ———, 95 W. 162 - 287
Zielke v. London Ass. Corp. 64 W. 442 - - - - 453
Zoldoske v. State, 82 W. 603 537

CASES DETERMINED

AT THE

January Term, 1898.

99	1
100	519
99	1
110	[7]674
110	[5]681
110	[5]682
99	1
112	[3]360
112	[4]363

CROGSTER, Appellant, vs. BAYFIELD COUNTY and others, Respondents.

February 11 — March 22, 1898.

Constitutional law: Limitation of municipal indebtedness: Bonds in aid of railroad: Entire and severable contracts: Consideration.

1. To ascertain the amount of indebtedness which a municipal corporation may incur in addition to that already existing, within the limit of five per centum upon the value of its taxable property, as fixed by sec. 3, art. XI, Const., the amount of cash on hand, and its available assets and resources easily convertible into cash to meet the payment of such liabilities when they become due, are to be subtracted from such existing indebtedness.
2. If a contract between a county and a railway company, for the issuing of bonds in aid of such company in excess of five per cent. on the value of its taxable property, is an entire contract, all bonds issued under it are absolutely void. The court cannot scale it down to an amount which the county might legally issue.
3. A contract entered into by the acceptance by a county of a proposition by a railroad company to build a railroad in six distinct sections, for each section of which the county is to issue its bonds of particular numbers, and upon the completion of such section or of a succeeding section the county is to deliver to the company the bonds issued for that section, in return for an equivalent amount of stock, is not entire but severable, and bonds so issued, not in excess of the constitutional limitation, will be valid.
4. A proposition submitted to a county by a railroad company in that form is a "definite proposition," within the requirements of secs. 943–948, R. S. 1878, specifying when the bonds shall be delivered with reference to the time of the complete construction of the

railroad from point to point; and bonds issued in conformity to such proposition, and not in excess of the constitutional limitation, will in that respect be valid.

5. Such a proposition by a railroad company, when accepted by the county, becomes an indebtedness of the county, within the meaning of the constitutional limitation, and will be deemed to have been incurred at the date of the contract, and not at the time of the completion and acceptance of the work.

6. The issuing by the railroad company of its certificates of stock and depositing the same in escrow, in accordance with such contract, is a good consideration for the issuing by the county of its bonds and agreeing to deposit and pay the same, and each party thereby becomes irrevocably bound by the contract.

7. The constitutional limitation of five per centum is based upon the last assessment preceding the incurring of the indebtedness, and not upon that last preceding the completion of the work. *State ex rel. M., T. & W. R. Co. v. Common Council of Tomahawk*, 96 Wis. 73, overruled. WINSLOW, J., dissents.

8. Where the bonds of the county, in such a case, are issued to the "railroad company, its successors or assigns," the county cannot escape liability merely because the company has transferred to another all its interest in the bonds to be earned on the completion of certain sections of the railroad.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed in part; reversed in part.*

This is an action brought by the plaintiff, as a property owner and taxpayer of the county, in behalf of himself and others, to set aside 240 bonds, of $1,000 each, issued by the defendant county in aid of the *Washburn, Bayfield & Iron River Railway Company*, and to restrain the delivery of such bonds to that company, or its assigns, on the ground that the indebtedness thereby incurred exceeds the constitutional limitation of five per cent. upon the assessed valuation of the property in the county. The defendant the *Bayfield Harbor & Great Western Railroad Company* claims to be the assignee of a portion of the rights and interest of the *Washburn, Bayfield & Iron River Railway Company* in and

to such bonds, and as such filed an answer in the case. The other defendants severally answered in the case.

The following facts are undisputed or found by the court:

On August 9, 1895, a proposition was made, in writing, to the county of *Bayfield*, as required by sec. 945, R. S. 1878, for a subscription to the capital stock of the defendant *Washburn, Bayfield & Iron River Railway Company*, in aid of said railway, upon the route and between the points therein prescribed, said railway to be completed on or before December 1, 1898, and to be constructed in six several sections, as hereinafter stated, and each section to be of standard gauge. The county subscribed for $240,000, at par value, of the capital stock of said *Iron River Railway Company*, payable in negotiable bonds of the county, to be issued according to law, for the purpose of paying for such subscription, to wit, 240 bonds, numbered, consecutively, from 1 to 240, both inclusive. Each bond was to be for $1,000, dated October 1, 1895, payable in twenty years after date, and bear interest at five per cent. per annum from the date thereof until paid.

The first section of said railway should commence at Washburn, and should extend from thence northwesterly to a point distant therefrom ten miles, measured along the railway line towards the junction point on or near section 19, and for which, when completed as proposed, the railway company, its successors and assigns, was to receive fifty-five of such bonds, numbered from 1 to 55, inclusive, as the first instalment thereof. The second section of the railway should commence at the northwest end of the first section, and extend thence northwesterly to the junction, and for which, when the third section should be completed as proposed, the *Iron River Railway Company*, its successors or assigns, was to receive forty-five of such bonds, numbered from 56 to 100, inclusive, as the second instalment thereof. The third section of the railway should

commence at Iron River, and extend thence northeasterly ten miles, measured along the railway line towards the junction point, and for which, when the fifth section should be completed as proposed, the *Iron River Railway Company*, its successors or assigns, was to receive thirty of such bonds, numbered from 101 to 130, inclusive, as the third instalment thereof. The fourth section of the railway should commence at the northeast end of the third section, and extend thence northeasterly to the junction point, and for which, when the second section should be completed as proposed, the *Iron River Railway Company*, its successors or assigns, was to receive forty-two and one-half of such bonds, numbered from 131 to 172½, inclusive, as the fourth instalment thereof. The fifth section of the railway should commence at Bayfield, and extend thence northwesterly twelve miles, measured along the railway line towards the junction point, and for which, when the fourth section should be completed as proposed, the *Iron River Railway Company*, its successors or assigns, was to receive forty-two and one-half of such bonds, numbered from 173 to 215, inclusive, as the fifth instalment thereof. The sixth section of the railway should commence at the northwest end of section five, and extend along the line of the railway to the junction point, and for which, when that section should be completed as proposed, the *Iron River Railway Company*, its successors or assigns, was to receive twenty-five of such bonds, numbered from 216 to 240, inclusive, as the sixth instalment thereof.

Said bonds should be delivered to the *Iron River Railway Company*, its successors or assigns, with reference to the time of the completion of the railway from point to point, in the manner indicated. The contract for the building of each of such sections should be deemed separate and distinct, subject, however, to the terms and conditions above specified. Whenever any section should be completed and operated as stated, the *Iron River Railway Company*, its

successors or assigns, should be entitled to and should receive the bonds for such section to the amount as above stated. In consideration of the execution and delivery of the bonds, the *Iron River Railway Company* should issue and deliver to *Bayfield* county 9,600 shares of the capital stock of that railway company, of the par value of $25 each, being a sum in all equal, at the par value of such stock, to the principal sum of said bonds, which should be delivered to the county treasurer of the county, or to the trustee thereinafter named, for the use of the county, at the same times and in like amounts as deliveries should be made of the bonds to the railway company, its successors or assigns. The stock and bonds so issued should be deposited in escrow with the Illinois Trust & Savings Bank, as trustee, or with such other trustee as should be agreed upon, within thirty days after demand therefor by the railway company, its successors or assigns; and whenever said railway company, its successors or assigns, should have earned or become entitled to the bonds on any of the sections of the railway, as above provided, the trustee should deliver them to the company, its successors or assigns, forthwith, on being tendered certain certificates for an equal amount of the capital stock of the railway company. The fact of construction, completion, and operation of any section might be proved by a resolution of the county board of the county, or in any other manner, provided that each time of the delivery of any of the bonds the interest should be canceled and marked paid on the proper coupons, to the end that the county should not be liable to pay any interest on any of the respective bonds, except from the time when the same should be earned and delivered as so agreed.

On September 17, 1895, an election was duly called and held at the usual places of holding elections in the county, at which a majority of all lawful votes cast was in favor of the proposition so submitted to the county. November 12,

1895, the county board subscribed for the capital stock of the *Washburn, Bayfield & Iron River Railway Company* in the sum of $240,000, and thereupon the county duly executed its corporate bonds to that amount, of $1,000 each, with interest coupons attached thereto, and January 12, 1896, placed the same in escrow with the *Milwaukee Trust Company*, in accordance with the terms of the proposition.

On September 19, 1896, the *Iron River Railway Company* executed and delivered to the defendant *Bayfield Harbor & Great Western Railroad Company* an assignment, in writing, whereby it, for good and valuable considerations, duly assigned, transferred, and set over to that company all the rights, privileges, title, and interest which it held and possessed in and to the subscription and bonds of the county pertaining to or to be earned by the construction of the fifth and sixth sections of the railway mentioned, together with the rights and privileges of constructing such railway over and through such fifth and sixth sections, so as to earn and be entitled to receive the $30,000 of bonds provided for the construction of the fifth section, and also the $25,000 of bonds provided for the construction of the sixth section, or any or either part of the amount of such bonds, subject to the terms and conditions set out in said instrument of assignment.

Such subscription of the county to the capital stock of the *Iron River Railway Company*, and the issue and delivery of such bonds by the county, and the placing of the same in escrow, and the assignment to the *Western Railroad Company*, were in good faith and without fraud. The organization of the *Iron River Railway Company* was in good faith, and for the purpose of building and operating a public highway for the transportation of freight and passengers, and not otherwise. The proposition, subscription, and issue of bonds, and the building of the railway, were and are entered into and carried on in good faith, and not for the pur-

pose of defrauding the county or any of its taxpayers. The value of the taxable property in the county, as shown by the assessments of all the towns as returned to the county clerk on or before the fourth Monday in August, 1895, for the year 1895, amounted in the aggregate to $5,148,802.39. Five per centum of such amount was $257,440. The indebtedness of the county September 17, 1895, consisted of the following specified items, aside from such railway aid bonds, to wit:

State loan	$25,000 00
Outstanding county orders for current expenses	829 55
Outstanding orders for court-house construction	10 00
Total	$25,839 55

In addition to the above, there existed the following items, claimed by the plaintiff as indebtedness of the county:

Balance due on court-house contract	$9,660 70
Dues on Fish creek bridge	1,000 00
Bills in justice court cases, etc	2,089 03
Other bills	7,487 52
Due Iron River on school tax	375 00
Due Iron River on delinquent tax	9,340 17
Total	$29,952 42

On November 15, 1894, the county levied a tax of $36,750.98. November 13, 1895, the county levied a tax of $86,345.95. September 17, 1895, there was in the hands of the county treasurer cash belonging to the county, $6,791.79. September 17, 1895, there were in the hands of the county treasurer tax certificates belonging to the county on sale of lands in the county, $32,422.87, of the cash value of $16,000. September 15, 1895, there was due from the then county treasurer to the county certain moneys belonging to the county, which were, April 2, 1896, determined to be $9,141.17, but the same is still in litigation. September 17, 1895, there was due to the county from towns $5,168.18.

As conclusions of law from such facts the court found,

in effect, that the proposition, subscription for stock, issue and delivery of the bonds, and all other proceedings taken thereon, were and are in good faith and valid and binding between the parties thereto and the plaintiff and other taxpayers of the county; that the transfer and assignment to the *Bayfield Harbor & Great Western Railroad Company* were valid and binding between the parties, and entitled that company to its portion of the bonds; that the obligation entered into by the acceptance by the county of such proposition, and the indebtedness thereby incurred, did not create an indebtedness of the county in excess of the amount limited by the constitution; that the county, the county treasurer, the *Milwaukee Trust Company*, and the *Washburn, Bayfield & Iron River Railway Company* were entitled to judgment dismissing the complaint, with costs; and that the *Bayfield Harbor & Great Western Railroad Company* was entitled to judgment decreeing valid and confirming its title to all the rights, privileges, interests, and property mentioned and described in the written assignment, and judgment was ordered thereon accordingly.

From the judgment so entered the plaintiff appeals.

For the appellant there were briefs by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*. They argued, *inter alia*, that by a proper construction of the constitutional limitation, its object was to restrain the incurring of indebtedness, without regard to whether the corporation had the means of payment. Nothing, at most, except cash on hand can be set off against existing indebtedness. *Council Bluffs v. Stewart*, 51 Iowa, 385; *Litchfield v. Ballou*, 114 U. S. 190; *Doon Township v. Cummins*, 142 id. 366; *Buchanan v. Litchfield*, 102 id. 287, 288; *Fowler v. Superior*, 85 Wis. 411, 424. The contract in this case is entire,— to subscribe for $240,000 of stock of the railway company and issue bonds in payment therefor, for the purpose of constructing a railroad to connect three villages. Its purpose

would be defeated if one link was omitted. *Cox v. W. P. R. Co.* 44 Cal. 18; *Hedges v. Dixon Co.* 37 Fed. Rep. 304; *Millerstown v. Frederick*, 114 Pa. St. 435. Being entire, the contract is void as a whole.

For the respondent *Bayfield & Iron River Railway Company* there was a brief by *H. H. Hayden* and *H. B. Walmsley*, attorneys, and *Davis, Kellogg & Severance*, of counsel, and oral argument by *H. H. Hayden* and *F. B. Kellogg*.

For the respondents *Milwaukee Trust Company* and the *Bayfield Harbor & Great Western Railroad Company* there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *G. H. Noyes*. They contended, among other things, that the fiscal condition of the municipal corporation was to be ascertained at each different time when any instalment of bonds was earned by the completion of a section of the railroad. *Hebard v. Ashland Co.* 55 Wis. 147; *Keystone Lumber Co. v. Bayfield*, 94 id. 491, 494; *State ex rel. M., T. & W. R. Co. v. Common Council of Tomahawk*, 96 id. 73. The debt was not incurred until then. *Thompson Houston Electric Co. v. Newton*, 42 Fed. Rep. 723; *Seymour v. Tacoma*, 6 Wash. 427; *Childs v. Anacortes*, 5 id. 452; *Keihl v. South Bend*, 76 Fed. Rep. 921; *Rathbone v. Board of Comm'rs of Kiowa Co.* 73 id. 395, 83 id. 125. If the issue of the whole amount would exceed the constitutional limitation, the excess only should be enjoined and the bonds be delivered according to consecutive numbers up to the constitutional limit. *Chicago, K. & W. R. Co. v. Board of Comm'rs of Osage Co.* 38 Kan. 597; *Finlayson v. Vaughn*, 54 Minn. 331; *Citizens' Bank v. Terrell*, 78 Tex. 450; *McPherson v. Foster*, 43 Iowa, 48; *Culbertson v. Fulton*, 127 Ill. 30; *Summers v. Board of Comm'rs of Wood Co.* 27 Kan. 314; *Daviess Co. v. Dickinson*, 117 U. S. 657; *Board of Comm'rs of Lake Co. v. Standley*, 49 Pac. Rep. (Colo.), 23; *Nolan Co. v. State*, 83 Tex. 182.

CASSODAY, C. J. 1. This action was commenced September 22, 1896, to set aside the contract between the railway company and the county, whereby the latter agreed to aid the railway company to the extent of $240,000, in bonds of $1,000 each, in exchange for a corresponding amount of stock in the company, and to restrain the delivery of the bonds issued and held in escrow therefor, on the ground that the aid so voted was in excess of the constitutional limitation. Sec. 3, art. XI, Const., as amended. That section declares that "no county, city, town, village, school district, or other municipal corporation, shall be allowed to become indebted *in any manner or for any purpose*, to any amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." After careful consideration, and in the light of numerous adjudications in other jurisdictions, this court has held that "so long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury, and the current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit, even though there may be for a short time some unpaid liabilities. In other words, a municipality's capacity for doing business on such cash basis, with outstanding liabilities, is necessarily measured by the amount of cash on hand, and the available assets and resources readily convertible into cash, to meet the payment of such liabilities as they become due." *Earles v. Wells*, 94 Wis. 298; *State ex rel. M., T. & W. R. Co. v. Common Council of Tomahawk*, 96 Wis. 73. Upon this basis it appears from the facts stated that the indebtedness of the county, September 17, 1895, aside from the bonds in question, and over and above the cash on hand,

and the available assets and resources readily convertible into cash to meet the payment of outstanding liabilities, was a little more than $33,000. That amount, with the $240,000 in bonds, would make $273,000. As stated, the court found that five per centum of the value of the taxable property in the county, as shown by the last assessment prior to September 17, 1895, was $257,440. If, as contended by plaintiff's counsel, the contract between the county and the railway company was an entire contract and the incurring of an indebtedness, within the meaning of the constitutional provision quoted, and if such value of taxable property in the county was to be so ascertained from such last assessment, then it is very obvious that such limit was exceeded by $15,560. Upon the theory thus assumed, there can be no question but that all the bonds so issued upon such void contract would be absolutely void. In other words, the bonds so issued upon such void contract could not be scaled down by the court to an amount which the county might thus have legally contracted to pay. *Hedges v. Dixon Co.* 150 U. S. 182; *Doon v. Cummins*, 142 U. S. 366. It would, in that event, be unlike the case where bonds were issued in excess of the amount voted by the county, and which were held valid only to the extent of the amount voted and first issued. *Daviess Co. v. Dickinson*, 117 U. S. 657.

2. The question recurs whether the proposition submitted by the railway company, and accepted by the county, constituted an entire or severable contract. As indicated, the proposition so submitted was for the construction of the road in six distinct sections, with bonds of particular numbers to be used in payment of each of the specified sections. The first instalment of bonds (numbered from 1 to 55, inclusive), in payment of the first section, were to be delivered when the first section should be completed; the second instalment thereof (56–100), in payment of the second section, to be delivered when the third section should

be completed; the third instalment thereof (101–130), in payment of the third section, to be delivered when the fifth section should be completed; the fourth instalment thereof (131–172½), in payment of the fourth section, to be delivered when the second section should be completed; the fifth instalment thereof (173–215), in payment of the fifth section, to be delivered when the fourth section should be completed; and the sixth instalment thereof (216–240), in payment of the sixth section, to be delivered when that section should be completed. It will be observed that the payment of the sixth instalment of $25,000 is not to be made, according to the proposition, until that section shall be completed; and hence, if that instalment should be rejected, as in excess of the constitutional limitation, upon the basis mentioned, then the first five instalments of $215,000, mentioned, and the other outstanding liabilities of $33,000, would only make $248,000, and would therefore be within the constitutional limit as found by the court.

The more difficult question is whether the statutes authorized the submission of such proposition to construct such railway in such separate and independent sections. In the statutes it is mentioned as "the proposition;" "such proposition;" "such a proposition." S. & B. Ann. Stats. secs. 943, 946. In sec. 945 it is mentioned as "a definite proposition in writing;" and which, if the subscription is to be made payable in bonds, shall specify "when said bonds shall be delivered with reference to the time of the complete construction of such railroad from *point to point;* and within what time such road shall be so constructed as to be entitled to such aid or bonds, *or any instalment thereof.*" So it is provided, in the section of the statute declaring the effect of accepting the proposition of the railway company, that "no such bonds shall be delivered, or be valid if delivered, until the road, to aid in the construction of which such bonds were voted, shall have been completed and in operation, by

the passage of cars continuously from one terminus to such *points* as such company shall have agreed to construct the same, in consideration thereof." R. S. 1878, sec. 948. After careful consideration, we are constrained to hold that the proposition submitted by the railway company was authorized by the statutes cited. Since this is so, and if we assume that the plaintiff's theory is otherwise correct, then it would logically follow that the first five instalments of the bonds, amounting to $215,000, are within the constitutional limit, and therefore valid.

3. At an election properly held upon due notice, September 17, 1895, the proposition so submitted was accepted by a vote of 1,602 for and 196 against the proposition. In issuing the bonds and placing them in escrow, the statutes appear to have been substantially complied with. R. S. 1878, secs. 943, 945; *Keystone Lumber Co. v. Bayfield*, 94 Wis. 494. An important question presented is as to the legal effect of such acceptance. The statute provides that, "whenever any municipality shall incur any indebtedness by the issue of bonds or municipal obligations, all the territory embraced within the limits of such municipality shall remain liable to the payment thereof, until such bonds or obligations are fully paid." R. S. 1878, sec. 944. The statute also provides that if such "definite proposition in writing," so made by the railway company, is "accepted" by the county, then it becomes "*irrevocably binding on such company.*" R. S. 1878, sec. 945. It further provides that by such acceptance the proposition becomes "mutually obligatory." R. S. 1878, sec. 946. It further provides that, when such proposition is thus accepted, "then the proposition so made by such company shall be deemed obligatory as a *mutual* agreement on such company and such municipality." R. S. 1878, sec. 948. The language of the statutes seems to be clear, certain, and unambiguous. The issuing of 9,600 shares, at $25 each, of the capital stock of the railway company, so deposited in

escrow, and the agreement of the company to construct the railway in sections, as indicated, certainly was a good consideration for issuing and agreeing to pay the bonds so deposited in escrow. The contract between the county and the company, therefore, was based upon a good and valuable consideration. *Phillips v. Albany*, 28 Wis. 340; *Bound v. W. C. R. Co.* 45 Wis. 543; *Lynch v. E., L. F. & M. R. Co.* 57 Wis. 430, 468; *Hall v. Baker*, 74 Wis. 118. Moreover, under the statute cited, it became mutually and irrevocably binding upon the county as well as the company.

There is no suggestion that such contract is repugnant to any constitutional inhibition, except as mentioned, nor that it is contrary to any principle of public policy. On the contrary, this court has repeatedly sanctioned the binding force of such contracts. Thus, it has been held that "where a proposition for county aid to a railroad upon stipulated conditions has been submitted to the electors of the county, and approved by their vote, such conditions cannot afterwards be essentially modified by any agreement between the railroad company and the board of county supervisors." *Douglas Co. v. Walbridge*, 38 Wis. 179. To the same effect, *Platteville v. G. & S. W. R. Co.* 43 Wis. 493. So, it was said by Mr. Justice COLE, in one of the cases cited, that "in a number of cases which have come before this court it has, in effect, been decided that a proposition for aid, submitted by a railroad company to the voters of a town or city, and accepted by the voters, becomes a contract mutually binding upon the railroad company and the town." *Bound v. W. R. C. Co.* 45 Wis. 564. These adjudications are expressly sanctioned by Mr. Justice PINNEY, speaking for the whole court, in *State ex rel. M., T. & W. R. Co. v. Common Council of Tomahawk*, 96 Wis. 73; and, upon the strength of other adjudications, he there said: "The legislature may confer directly the necessary authority for such purposes on the proper town, city, or county authorities to represent and act for the mu-

nicipal corporation or organization, . . . and the municipal authorities may be compelled to issue the bonds if the contract has been performed on the part of the railway company." *State ex rel. G. B. & M. R. Co. v. Jennings*, 48 Wis. 549.

4. Of course, the contract so made was an executory contract. Before any instalment of bonds was to be delivered to the company, or any taxes were to be collected to make payments thereon, the company was required to perform on its part and construct the section of the road called for by the contract. *Keystone Lumber Co. v. Bayfield*, 94 Wis. 491. The most important question in the case is whether such contract, when so made, became an indebtedness of the county, within the meaning of the constitutional provision quoted. That provision is found in the amendment of 1874 to sec. 3, art. XI, of the constitution. It was manifestly intended to prohibit abuses which formerly existed by reason of the failures of the legislature to sufficiently restrict the powers of municipalities in the matter of "borrowing money, *contracting debts*, and loaning their credit." See the section before the amendment. Mark the language of the amendment: "No county . . . *shall be allowed* to become *indebted in any manner or for any purpose*, to any amount," exceeding the limit therein fixed. This language is broad enough to include the contracting of any such debt or the incurring of any such liability.

Thus, it was held by this court in *Hebard v. Ashland Co.* 55 Wis. 145, that, "where a county is already indebted in a sum exceeding five per cent. of the value of the taxable property therein, it cannot incur a further indebtedness for building a court house, or for any other purpose, and a tax levied to pay such further alleged indebtedness is void." *Earles v. Wells*, 94 Wis. 298. Such language has been construed to "forbid *implied* as well as expressed indebtedness." *Litchfield v. Ballou*, 114 U. S. 190. So, it has been

construed to be "an absolute limitation upon the power of the county to *contract* any and all indebtedness" for any and every purpose whatsoever. *Lake Co. v. Rollins*, 130 U. S. 662. So, it has been held that the legislature cannot, either directly or indirectly, dispense with such limitation upon the power of municipal corporations "to incur debts." *Lake Co. v. Graham*, 130 U. S. 674. So, it has been held, under such provision, that, "when such municipality shall have reached the limit prescribed by the constitution, it is prohibited from making any contract whereby an indebtedness is created, even for the necessary current expenses in the administration of the affairs and government of the corporation." *Prince v. Quincy*, 105 Ill. 138. So, it has been held that, "where a city enters into a contract to pay a sum of money when certain work shall be done and accepted, the obligation thereby assumed will constitute a debt, within the meaning of the constitutional limitation of its power to incur indebtedness. Such indebtedness will be regarded as having been incurred from the date of the contract, and not postponed to the time of the completion and acceptance of the work." *Culbertson v. Fulton*, 127 Ill. 30. So, it has been held that "a contract by a city to pay an annual rental for the use of water hydrants and electric lights is a contracting of indebtedness within the meaning of a constitutional limitation." *Beard v. Hopkinsville*, 95 Ky. 239; *S. C.* 23 L. R. A. 402. To the same effect, *Howard v. Smith*, 91 Tex. 8.

The authorities cited are all to the effect that the acceptance of the proposition was "the incurring of such indebtedness," within the meaning of the constitution. This is in harmony with the ruling of this court in *Earles v. Wells*, 94 Wis. 285, where it was held, in effect, that the city had no power to assume an obligation or incur a debt or liability in excess of the constitutional limit.

5. There is another view of the question which leads to

the same conclusion. The limit of such indebtedness, as fixed in the constitutional provision in question, is "five per centum on the value of the taxable property" in the county, "to be ascertained by the *last assessment* for state and county taxes *previous to the incurring of such indebtedness.*" The manifest purpose of ascertaining such value of the taxable property in the county by such "last assessment" previous to the incurring of such indebtedness was to enable all parties to know in advance whether the debt so contracted was within or exceeded the constitutional limit. In the language of Mr. Justice LAMAR, speaking for the whole court, in one of the cases cited: "In this case the standard of validity is created by the constitution. In that standard two factors are to be considered,— one the amount of the assessed value, and the other the ratio between that assessed value and *the debt proposed.* These being exactions of the constitution itself, it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts." *Lake Co. v. Graham*, 130 U. S. 683, 684. In that case the indebtedness of the county was considered as of September 6, 1881. The bonds were authorized by a vote of a majority of the electors, November 8, 1881, and the bonds were issued January 2, 1882, and were payable in ten to twenty years. As indicated in that opinion, the two standards of validity created by the constitution, to wit, the amount of such assessed value and the ratio between that "value and the debt proposed," are indispensable requisites, and must always be kept in mind in determining the validity of any such contract. The legislature necessarily had them in mind when they provided that the acceptance of such proposition by the qualified voters of the county should be mutually and irrevocably binding, not only upon the company, but the county. This conclusion is irresistible from the fact that the same legislature which first proposed that

constitutional amendment enacted those statutes essentially as they are now in force, except that such statutes provided that no bonds should be issued by any city, etc., to an amount exceeding ten per centum upon the valuation of the taxable property therein as the same should "appear upon the last previous assessment roll," nor by a county exceeding such per centum "upon the valuation of the property therein, as fixed by the last previous state board of equalization." Laws of 1872, ch. 182. The present statute fixes the qualification of the voters for accepting the proposition as those "who were assessed for taxes on real or personal estate in such municipality, as shown by the last assessment roll." S. & B. Ann. Stats. sec. 946; *State ex rel. C., M. & St. P. R. Co. v. Blackstone*, 63 Wis. 362.

To hold that there was no liability on the part of the county by reason of such acceptance of the proposition, and no indebtedness incurred by the issuing of the bonds and placing them in escrow, until the completion of the road or some section thereof, and the delivery of the bonds, and that the question whether such constitutional limitation had been exceeded should be determined with reference to the last assessment prior to such completion of the road and delivery of the bonds, would not only overturn numerous decisions cited, but nullify the statutes and the provisions of the constitutional amendment quoted. Upon such theory, it would not be the majority of the qualified voters who had power to bind the county, but the manipulation of the different assessors who might happen to be in office at the time of such last assessment prior to such completion of the road and delivery of the bonds. If such assessors desired to defeat the payment of the bonds, they could easily do so by cutting down the assessment; and, if they desired to enforce such payment, they could do so by increasing the assessment. In other words, upon such theory, it would be untrue that the acceptance of the proposition was mutually and irrevo-

cably binding upon the county as well as the company, since the county would not be bound at all, unless such subsequent assessment should be favorable to the company. Such uncertainty would not only produce endless confusion on the part of the county or other municipality in the matter of contracting debts, but render the bonds valueless as security for the construction of the road. All such confusion and uncertainty is avoided by holding, as the law manifestly is, that the "last assessment" mentioned in the constitution is the last assessment prior to the acceptance of such proposition, or, in the language of the constitution, "the last assessment . . . previous to the incurring of such indebtedness."

In support of the contrary proposition, counsel naturally rely, mainly, upon one branch of *State ex rel. M., T. & W. R. Co. v. Common Council of Tomahawk*, 96 Wis. 73, cited above. In that case the railway company had commenced, and during the pendency of the action had seasonably completed, the road, and hence our attention was more particularly called to the rights of the parties after the railway had fully performed the contract on its part. But the writer of this opinion hereby assumes his full share of responsibility for all that is said in the *Tomahawk Case*, the same as though he had written the opinion himself. Nevertheless, after very careful consideration, we are constrained to hold that the conclusion reached on the branch of that case last mentioned is contrary to the spirit, intent, and meaning of the statutes and the constitution, as well as numerous decisions in this and other courts, and hence to that extent must be regarded as overruled.

6. The aid was voted to the *Washburn, Bayfield & Iron River Railway Company*, "its successors or assigns," and hence the trial court properly held that the county could not escape any liability merely by reason of that company having assigned, transferred, and set over to the *Bayfield Harbor & Great Western Railroad Company* all its rights,

privileges, title, and interest in and to such subscription and bonds pertaining to or to be earned by the construction of the fifth and sixth sections of the road mentioned. *Lynch v. E., L. F. & M. R. Co.* 57 Wis. 430; *Cass Co. v. Gillett*, 100 U. S. 585.

We must hold that all the bonds are valid, except the last instalment of $25,000, for the construction of the sixth section of the road, and that they are void.

By the Court.— That part of the judgment sanctioning the validity of such last instalment of bonds is reversed, and the judgment in all other respects is affirmed, and the entry thereof is to be modified accordingly. Neither party is to have costs, except the plaintiff is to pay the clerk's fees.

WINSLOW, J. In *State ex rel. M., T. & W. R. Co. v. Common Council of Tomahawk*, 96 Wis. 73, it was held that municipal indebtedness represented by railway aid bonds was "incurred" within the meaning of sec. 3, art. XI, Const., at the time when the contract is performed by the railway company and it is entitled to the delivery of the bonds. This decision was made upon full consideration and argument of the question, and I see no good reason for summarily overruling it before the ink is fairly dry. I therefore dissent from so much of the present decision as overrules that case, but no more.

---

99 20
106 300

SLAUSON, Appellant, vs. GOODRICH TRANSPORTATION COMPANY, Respondent.

March 1—March 22, 1898.

Ejectment: Evidence of title: Deed, reference to plat: Evidence on second trial: Record on appeal.

1. In order to recover in ejectment, where neither the pleadings nor the proof show that the parties derived their titles from a common grantor, or show the source of the defendant's title, or that he had

ever been in possession of the land, the plaintiff must either connect himself with the government title or with some grantor who was the common source of title to both parties.

2. Where a deed, in describing the property conveyed, refers to a map or plat as marking the natural boundaries of such property, such plat should be considered as giving the true description as much as though it was marked down on the deed.

3. In order that the competency of a document, which was offered in evidence at the trial and excluded, may be determined on appeal, it must be brought into the record.

4. Where a judgment is vacated, the action stands for trial as if it never had been tried, and the fact that evidence which was incompetent was admitted at the former trial is no reason for its admission upon a subsequent trial.

APPEAL from a judgment of the circuit court for Racine county: JOHN GOODLAND, Judge. *Affirmed.*

Ejectment. The complaint is in the ordinary form, alleging that plaintiff is the owner and entitled to the possession of the premises described, and that defendant unlawfully withholds possession. The answer is a general denial, and a further defense that plaintiff nor her ancestors or grantors had been possessed of the premises within twenty years preceding the commencement of the action. A judgment for plaintiff on the merits was affirmed in this court. 94 Wis. 642. Within the time limited by statute, defendant paid the costs and took a new trial.

At the opening of the trial, plaintiff's counsel made the following statement: "It is conceded for the purposes of this trial that Isaac Taylor, in his lifetime, owned all the lands between Second street and Root river that lay east of a point 140 feet east of the east line of Chatham street." Counsel for defendant responded: "I will examine the abstract of title and the deeds of the lands referred to, and I will inform you [addressing Mr. Fish, plaintiff's counsel] tomorrow morning whether I will agree to your requested stipulation or not." No further reference to this stipulation appears in the bill of exceptions. Plaintiff's counsel then

offered in evidence a deed from one Taylor and wife to William Waterman, said to describe a piece of land immediately west of the lands in controversy. The date or place of record of this deed does not appear. Next, the will of Isaac Taylor, in which Emeline Taylor is named as devisee, was offered. Then followed a deed from Emeline Taylor to James H. Kelly, George Murray, and George W. Slauson. This deeds purports to convey parts of block 7 of the original plat of Racine, and is assumed by plaintiff's counsel to cover the land in suit, but there is no evidence in the bill of exceptions from which this fact can be definitely determined. Plaintiff's counsel then called a witness for the purpose of showing "where Root river was at the time this deed was made." This testimony was objected to and the objection sustained. Plaintiff's counsel then offered to make further proof along that line, and to show title from Kelly and Murray, through mesne conveyances, to plaintiff, of the property claimed in her complaint. References were made to plat No. 1 and map No. 8, which were offered by plaintiff, but which are not preserved in the bill of exceptions. Plaintiff thereupon rested her case, a nonsuit was granted, and judgment was entered for defendant, from which this appeal is taken.

For the appellant there was a brief by *John T. Fish*, of counsel, and *Quarles, Spence & Quarles*, attorneys, and oral argument by *J. V. Quarles*. They contended that a deed is to be construed with reference to the actual state of the property at the time of its execution. Broom, Legal Maxims, 532, 682; 3 Washb. Real Prop. (4th ed.), 384, 408–422; *Roberts v. Roberts*, 55 N. Y. 275; 3 Kent, Comm. 434. The same deed was received in evidence upon the first trial and was construed as evidence of title, and that construction was approved by the supreme court by affirming the judgment. *Lathrop v. Knapp*, 37 Wis. 307, 312; *Klatt v. N. C. Foster Lumber Co.* 97 id. 641.

For the respondent there was a brief by *Thomas M. Kearney*, of counsel, and oral argument by *Mr. Kearney* and *Mr. W. D. Thompson.*

BARDEEN, J. We are placed at some disadvantage by reason of a dispute having arisen between counsel as to the actual facts that were before the trial court at the time the motion for nonsuit was granted. A reference to the bill of exceptions, however, seems to settle the contention adversely to the claims of appellant. Neither have we been favored by any definite assignment of error upon which appellant relies, unless it be the broad statement that the court erred in the granting of a nonsuit. This requires an examination of the evidence received and offered on the trial, and the rulings of the court thereon.

A party claiming title and right to possession of land, under a very familiar rule, must recover upon the strength of his own title, rather than upon the weakness of the title of his adversary. Ordinarily, the plaintiff must connect himself with the government title, unless both parties claim from a common source, as was the case in *Sexton v. Rhames*, 13 Wis. 99. But here neither the pleadings nor the proof offered show a common grantor. There is not a whisper in the evidence indicating from what source respondent claims title. Neither does the answer disclose any information from which a deduction can be made as to the source of respondent's title, nor does the evidence received or offered show that respondent was, or ever had been, in possession of the land. Such being the state of the record it became necessary for the appellant either to connect herself with the government title or with some grantor who was the common source of title. Such necessity seems to have been in the mind of counsel for appellant when he asked for the stipulation referred to in the statement of facts. The stipulation not having been consented to, and there being a

failure of appellant to connect herself with the original title, it follows as a necessary conclusion that her title failed, and the nonsuit was properly ordered.

Still further, there was no evidence that appellant or her grantors had ever been in possession of the disputed premises, so as to give rise to any presumptions which such possession might give. *Ablard v. Fitzgerald*, 87 Wis. 516. But, if this were not so, there is still another reason why, under the situation presented, the conclusion of the trial court was right. When evidence was offered to show the condition of things at the time of the execution and delivery of the deed from Emeline A. Taylor to Kelly, Murray, and Slauson, counsel referred to a certain plat marked "Plat No. 1," and a map "No. 8," which were ruled out. These papers, taken in connection with this deed, it is argued, would have shown the condition of the land at the time the deed was executed, and were essential to appellant's case. Whether this be so or not, the failure to preserve them in the bill of exceptions leaves us powerless to determine their competency. When a document is offered and excluded, it must be brought into the record, in order that the court, on appeal, may determine its competency. Elliott, App. Proc. § 748. Map No. 8 seems to have been a paper that was used on the hearing of this case in this court on the former appeal. At the trial it does not appear to have been marked or identified, nor is it attached to or referred to in the bill of exceptions on this appeal, any further than has been stated. This court can take cognizance of papers or documents which are not a part of the judgment roll only when they have been preserved and properly identified in the bill of exceptions. The deed from Emeline A. Taylor to Kelly, Murray, and Slauson purports to convey a tract of land being "part of block 7 according to the original plat of the village, now city, of Racine, made by Moses Vilas, surveyor, and recorded in the office of the register of deeds of said Racine county." Respondent's

counsel objected to the reception of this deed unless the plat referred to therein was produced. Appellant's counsel refused to produce the plat, because "it did not show the condition at the time the deed was made." The deed was admitted. A witness was then produced, who testified that Root river flowed into Lake Michigan at different places at different periods. Counsel announced that the purpose of this testimony was to show where Root river was at the time the deed was made. Further testimony along this line was objected to because the tract conveyed by the deed was in block 7, while the land sought to be recovered was not included therein, but was adjacent to block 67. In the colloquy which ensued between the court and counsel, it must be assumed that, if the plat referred to in the deed should govern, the deed conveyed no portion of the disputed premises. This was the conclusion of the trial court, and upon which he sustained the objection. With this decision we certainly agree.

The deed in question purported to cover only a portion of block 7 according to the original plat made by Moses Vilas, surveyor. "A deed containing a description, and referring to a map having lines drawn upon it, and marking natural boundaries and the natural objects delineated on its surface, should be considered as giving the true description of the land, as much as if the map were marked down on the deed." 2 Devlin, Deeds, §§ 1020, 1021; *Chapman v. Polack*, 70 Cal. 487. And see *Masterson v. Munro*, 105 Cal. 431; *Schenley v. Pittsburgh*, 104 Pa. St. 472. In this case, the deed calling for a tract of land in block 7, according to a specific survey, cannot be extended to cover land in some other block by the evidence received or offered at the trial. If the deed in question does not convey the disputed tract when read with reference to the plat, then the grantee should seek its reformation. The fact, if it be a fact, that this deed was offered and received in evidence on the former trial cuts no figure in this case.

Under R. S. 1878, sec. 3092, respondent was entitled to a new trial upon compliance with its terms. When the judgment was vacated, the action stood for trial as if it had never been tried. *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316; *Hewitt v. Wis. River Land Co.* 81 Wis. 546; *Edwards v. Edwards*, 22 Ill. 121; *Hammond v. Carter*, 161 Ill. 621; *Donahue v. Klassner*, 22 Mich. 252; *Eichert v. Schaffer*, 161 Pa. St. 519; *Brownsville v. Cavazos*, 100 U. S. 138.

The view we have taken of this case renders it unnecessary to determine the motion of respondent to strike out a part of the record sent to this court. The provisions of rule VII½ are plain and easily understood, and at this late day there is no excuse for a violation of it.

By the Court.—The judgment of the circuit court is affirmed.

With this case as reported in 40 L. R. A. 825, there is a note on the effect of a prior decision upon the statutory new trial in a real action.—REP.

---

99 26
199 33
99 26
f101 664
99 32
s101 664
99 26
104 214
104 353
104 355
99 26
105 7
105 63
105 103

WENTWORTH, Respondent, vs. RACINE COUNTY, Appellant.

March 1—March 22, 1898.

Construction of statutes: Constitutional law: County boards: Publication of proceedings: Res adjudicata.

1. An act of the legislature cannot properly be judicially declared void for uncertainty if it will admit of any reasonable construction that will support it.
2. The mere wisdom or reasonableness of a law is not a matter for judicial determination, but is exclusively within the domain of legislative power.
3. Ch. 250, Laws of 1895, delegating to county boards power to legislate in regard to officers' fees in certain cases, is constitutional under the rule in *Ryan v. Outagamie Co.* 80 Wis. 386.

4. The constitutional and statutory requirement for the publication of laws as a prerequisite to their validity does not extend to the publication of mere ordinances, resolutions, and proceedings of local governing bodies, pursuant to a valid grant to such bodies of power to legislate in regard to such matters.
5. The general statute requiring the publication of the proceedings of county boards is directory, and a failure to comply therewith does not invalidate such proceedings.
6. The rule that a judgment in bar, or as evidence in estoppel, is binding not only as to every question actually presented and considered and upon which the court rested its decision, but every question that might have been presented and decided as well, does not apply to a different cause of action between the same parties, except as to questions shown to have been actually decided in the former action.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Reversed.*

Plaintiff filed a bill for services as justice of the peace, for allowance by the defendant county, made out in accordance with the general statute on the subject. Such board, having previous to the performance of the services made a regulation in regard to officers' fees in certain cases, pursuant to ch. 250, Laws of 1895, determined that plaintiff was only entitled to recover in accordance with such regulations, and accordingly allowed his bill in part and disallowed it in part. From such determination an appeal was duly taken by the plaintiff to the circuit court, and such proceedings were there duly had that it was determined that the county board, November 18, 1895, pretending to act under ch. 250, Laws of 1895, aforesaid, by resolution, established the fees for services of justices of the peace in the cases covered by plaintiff's bill, and that the allowance made by such board on such bill was strictly in accordance with such resolution; that no certified copy of such resolution was ever published, hence that it never became valid, even if the statute attempting to authorize it were valid; that such statute is

void for uncertainty and is improper and unconstitutional; hence that the general statutes of the state, in accordance with which plaintiff's bill was made out as presented to the county board, governed the subject. Judgment was therefore ordered in plaintiff's favor for the amount of the claim disallowed by the county board. Judgment was entered accordingly, from which this appeal was taken.

On the trial the record of a former case between the same parties, for the recovery of fees, was introduced in evidence, but there was no evidence to show that the validity of the resolution in question was there determined.

Peter B. Nelson, for the appellant, argued, among other things, that, though a city charter requires ordinances to be published, yet publication is not essential to their taking effect. Sutherland, Statutory Construction, §§ 446, 447, 454; *Conboy v. Iowa City*, 2 Iowa, 90; *Arthur v. Adam*, 49 Miss. 404; *Chesnut v. Elliott*, 61 id. 569; *Fifield v. Marinette Co.* 62 Wis. 532; *State v. Click*, 2 Ala. 26; *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 239; *In re New York P. E. Public School*, 47 N. Y. 556; *People v. Cook*, 14 Barb. 259. The former judgment was not an estoppel. Something more is necessary to make it so than a similarity of facts or a common question of law. *Davenport v. C., R. I. & P. R. Co.* 38 Iowa, 633–640; *Aultman v. Mount*, 62 id. 674.

John T. Wentworth, for the respondent, contended that the county board could not exercise the power delegated to it of fixing the compensation of justices, previously fixed by a general law, by a law or resolution which is not properly published. *State ex rel. Cothren v. Lean*, 9 Wis. 279; *Clark v. Janesville*, 10 id. 136; *State ex rel. Hawes v. Pierce*, 35 id. 93; *Smith v. Sherry*, 54 id. 114; *Burnham v. Webster*, 5 Mass. 266; *Heridia v. Ayers*, 12 Pick. 334; *Calking v. Baldwin*, 4 Wend. 667; *Burnham v. Acton*, 35 How. Pr. 48; *Rogers' Case*, 2 Me. 303. The judgment in a former action between the same parties involving the same question of law is an

estoppel as to conclusions both of law and fact which necessarily flow from such judgment, although not expressly found. *Cromwell v. Sac County*, 94 U. S. 351; *Pray v. Hegeman*, 98 N. Y. 351; *Woodgate v. Fleet*, 44 id. 1.

MARSHALL, J. The questions for consideration on this appeal are: (1) Is ch. 250, Laws of 1895, void for uncertainty? (2) Is such chapter improper or unconstitutional? (3) Is it requisite to the validity of a regulation fixing officers' fees under such chapter that it be published, as laws are required to be published under the constitution and statutes of this state? (4) Was the question of the legality of plaintiff's claim *res adjudicata* by reason of the court having, in a previous action between the same parties, allowed a recovery of fees in accordance with the general statutes? These questions will be briefly considered in their order.

1. The title of the act of 1895 is in the following language: "An act relating to the punishment of vagrancy, drunkenness, and similar offenses, and the fees of officers in prosecution therefor." The body of the act, in sec. 1, provides for the manner of punishing offenders of the classes mentioned, and sec. 2 provides that county boards of supervisors may, from time to time, fix and regulate the fees or compensation of officers and magistrates for services performed in all prosecutions for any of such offenses, except when such prosecutions shall be under a city or village charter or ordinance. Wherein there is any indefiniteness in either the title or the body of the act is not pointed out in the findings of the trial court, or suggested by respondent. If uncertainty exists so as to warrant the court in saying that the law is void on that account, there ought not to be any difficulty in discovering it, for legislation cannot properly be thus brushed aside and nullified if susceptible of any reasonable construction that will support it. No difficulty in discovering such construction appears. The title refers to and calls for provisions in

regard to the punishment of several well-known classes of offenses, and for the regulation of the fees of officers in the enforcement of the law in regard to such offenses. The body of the act responds clearly to the calls of the title, making a law easily understood, so far as anything which we can discover.

2. The mere wisdom or reasonableness of the act is not a matter for judicial investigation. That is a field exclusively within the domain of legislative power. Within constitutional limitations, it is for the legislature to make the law, and for the courts to declare and apply it, without reference to the notions of judges as to the wisdom or reasonableness of it. That the law in question is not in excess of constitutional legislative power is ruled by *Ryan v. Outagamie Co.* 80 Wis. 336. It is sufficient for this case, on that question, to refer to that decision.

3. The constitutional requirement in regard to the publication of laws, and the legislative requirement as well, refer to statutes enacted by the legislature, not to mere ordinances, resolutions, or proceedings by local governing bodies pursuant to a valid grant of power to legislate in regard to local matters. We are referred to numerous adjudications to support the contention that the resolution of the county board is invalid because not published, none of which appears to affect the question. They go only to show that an act passed by the legislature, to be valid, must be published, as in *State ex rel. Cothren v. Lean*, 9 Wis. 279, where the question arose in regard to a law providing for the submission to voters of the question of the removal of a county seat, or to show that, where the statute provides for legislation by local bodies and that it shall be published, publication of such local legislation is necessary, as in *Smith v. Sherry*, 54 Wis. 114. The question there was whether a determination by a county board, in respect to changing the boundaries of a town, was valid without publication thereof,

in view of the fact that the statute provided that legislation in that regard by county boards should be published in a particular manner. The statute in question delegated power to county boards to legislate. That was duly published in all respects as required by law. It does not contain any provision requiring the action of a county board under it to be published as a prerequisite to its validity. The claim that the general statutes, requiring the publication of the proceedings of county boards for the information of the public, applies, cannot be sustained. That is purely directory; compliance with it is not essential to the validity of the proceedings.

4. The fact that in another case, on a different cause of action, the validity of the law in question might have been determined, does not make the judgment there rendered *res adjudicata* in this case, in the absence of evidence to show that the question was actually presented to the court and decided, and became a part of the judgment. The doctrine of the conclusiveness of a former adjudication does not go so far as to make such adjudication in one case necessarily binding between the same parties in another case, involving questions that might have been decided in the former. The general rule is often stated by courts and text writers, that a judgment in bar, or as evidence in estoppel, is binding not only as to every question actually presented and considered and upon which the court rested its decision, but as to every point that might have been presented and decided in the case, and that is strictly accurate when applied to the cause of action in which the adjudication occurs, whether in the same or in some other case, but not when the same question is subsequently raised between the same parties on a different claim or cause of action. In the latter situation the former judgment is binding only as to matters actually presented and litigated in the former case. To make the rule applicable literally, there must be an identity of parties,

an identity of subject matter, and an identity of cause of action. In *Cromwell v. Sac Co.* 94 U. S. 351, Mr. Justice FIELD, speaking for the court, very clearly points out the difference between the effect of a judgment in the same action, or in regard to the same cause of action, and when it is resorted to as an estoppel between the same parties upon a different claim or cause of action. Here there is no proof that the precise question upon which this case turned was presented in the former case and decided; therefore, though, apparently, such question might have been decided, the judgment does not affect plaintiff's right to recover one way or the other.

It follows from what has preceded that the regulation of officers' fees, made by the county board of *Racine* county, in accordance with which plaintiff's bill was allowed by the county board, was valid, and measured the right of plaintiff to recover, and that the decision of the trial court to the contrary must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment for costs in favor of the defendant.

The above mandate was modified January 10, 1899. See *ante*, page iv.

MOREY, Respondent, vs. RACINE COUNTY, Appellant.

March 1 — March 22, 1898.

Wentworth v. Racine Co., ante, p. 26, followed.

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Reversed.*

Peter B. Nelson, for the appellant.

John T. Wentworth, for the respondent.

The cause was submitted and decided with the preceding case.

MARSHALL, J. This was an action to recover of the defendant an amount claimed to be due for justice's fees. The plaintiff claimed fees according to the general statutes on the subject. The county board allowed fees in accordance with a regulation made by it pursuant to ch. 250, Laws of 1895. On appeal to the circuit court it was decided that the county regulation was void, and judgment in favor of the plaintiff for the amount disallowed by the board was thereupon rendered. Only the question of the validity of the aforesaid regulation is involved on this appeal.

The case is ruled by the decision in *Wentworth v. Racine County*, *ante*, p. 26.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in favor of the defendant for costs.

KOHLER, Appellant, vs. WEST SIDE RAILROAD COMPANY, Respondent.

99 33
102 223
104 126
99 33
108 70
99 33
112 *228
99 33
113 *616

March 1 — March 22, 1898.

Juror, competency of: Appeal, harmless error: Negligence: Special verdict: Instructions.

1. A person is not disqualified to sit as a juror in an action against a street railway company by the mere fact that he is in the employ of another street railway company, if it does not appear that his relations to such company will be likely to bias his judgment.
2. To overrule the challenge for cause of a juror is not prejudicial error, unless it appears that an objectionable juror was forced upon the party after such party had exhausted his peremptory challenges.
3. The admission of leading questions is so largely in the discretion of the trial judge that the appellate court will not interfere except in a case of manifest abuse of discretion.
4. Where, in an action for personal injuries, the evidence as to the nature and character of the plaintiff's injuries was undisputed, and

the judge had charged the jury that, in estimating damages, they should make allowance for the pain and suffering the plaintiff was reasonably certain to endure thereafter from the deformity of his leg and the depreciation of his capacity to earn a livelihood in the future, *held*, that it was not error to refuse to require the jury to make a special finding as to whether the plaintiff's injury was permanent. That would have no bearing except upon the amount of his recovery.

5. Although a street-car conductor may have been guilty of negligence in suddenly starting his car without warning a passenger who was about to alight, thereby proximately causing his injury, yet, if such passenger failed to exercise ordinary care in making the attempt, he cannot recover therefor.

6. In cases where special verdicts are submitted, the law does not contemplate, nor does proper practice require the court to give, instructions as to the general duty or liability of parties, but the instructions should be directed to the specific questions asked.

7. An instruction that street railways are responsible for the negligence of their agents in the management of their cars "if any injury accrues therefrom and the passengers themselves are without fault," if objectionable standing by itself, will be rendered harmless if full and correct instructions are also given as to the duty of passengers.

8. A special verdict to the effect that the conductor of the car was guilty of negligence which was the proximate cause of the injury, and (upon evidence supporting it) that the plaintiff was guilty of negligence which proximately contributed to the injury sustained, which has been passed upon by the trial court, *held* not to be inconsistent and will not be disturbed on appeal.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This action is brought to recover damages claimed to have been sustained by plaintiff while riding on one of defendant's street cars in the city of Milwaukee, in April, 1892. The ground of recovery is the alleged negligent starting of the car without warning, as plaintiff was about to alight therefrom, by which he was thrown violently to the pavement and sustained a fracture of his right leg.

A special verdict was returned by the jury in which they found: (1) That plaintiff was injured while alighting from

defendant's street car near the foot of Wisconsin street. (2) That the car came to a full stop just before the plaintiff alighted therefrom. (3) That plaintiff had sufficient reason to believe that the car would stop a sufficient length of time to enable him to safely alight therefrom with the use of ordinary care and prudence. (3*a*) That plaintiff did not proceed to alight from the car while it was in motion. (4) That the motorman did not know plaintiff was alighting from said car, in time to avoid the injury. (5) That the motorman ought not, in the exercise of proper care, to have known that plaintiff was getting off the car. (6) That the motorman was not guilty of negligence. (7) That the conductor was guilty of negligence that proximately caused plaintiff's injury. (8) That plaintiff was guilty of a want of ordinary care and prudence which proximately contributed to the injury. (9) That plaintiff's damages were $1,229.50.

Plaintiff moved for a new trial, and defendant for judgment on the verdict. Defendant's motion was granted and judgment was duly entered, from which this appeal is taken.

For the appellant there was a brief by *C. E. Estabrook* and *Elliott & Hickox*, and oral argument by *C. E. Estabrook* and *E. S. Elliott*. They argued, *inter alia*, that it was error not to exclude the juror who was challenged for cause. He was clearly disqualified, and the plaintiff was deprived of one peremptory challenge. *People v. Casey*, 96 N. Y. 115; *Omaha & R. V. R. Co. v. Cook*, 37 Neb. 435; *State v. Miller*, 29 Kan. 43; *State ex rel. Getchel v. Bradish*, 95 Wis. 205; *Hubbard v. Rutledge*, 57 Miss. 7; *Louisville, N. O. & T. R. Co. v. Mask*, 64 id. 738; *Hill v. Corcoran*, 15 Colo. 270; *Stumm v. Hummel*, 39 Iowa, 478; *Central R. Co. v. Mitchell*, 63 Ga. 173; *Page v. C. V. R. R.* 21 N. H. 438. The question whether the plaintiff's injury was permanent bore upon an important issue, and ought to have been submitted. *Bagnowski v. A. J. Linderman & H. Co.* 93 Wis. 592; *McGowan v. C. & N. W. R. Co.* 91 id. 147, 155; *Davis v. C., M. & St. P.*

R. Co. 93 id. 470; *Kerkhof v. Atlas Paper Co.* 68 id. 674, 676; *Pratt v. Peck*, 65 id. 463; *Wagner v. Finnegan*, 65 Minn. 115. The most important question of proximate cause was not fairly submitted. *Sheridan v. Bigelow*, 93 Wis. 426; *Klatt v. N. C. Foster Lumber Co.* 92 id. 622; *Andrews v. C., M. & St. P. R. Co.* 96 id. 348; *Deisenrieter v. Kraus-Merkel M. Co.* 97 id. 279; *Maitland v. Gilbert Paper Co.* id. 476. The instructions given as to the respective duties of railway companies and their passengers were not applicable and the verdict was inconsistent. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 429. The refusal to charge correctly on the subject of contributory negligence was error. *Heucke v. Milwaukee City R. Co.* 69 Wis. 401, 407; *Finn v. Valley City St. & C. R. Co.* 86 Mich. 74.

For the respondent there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. P. Miller.*

BARDEEN, J. At the opening of the trial, one N. E. Gailey was called as a juror, who testified that he was in the employ of the Milwaukee Electric Railway & Light Company, but in what capacity does not appear. Appellant's counsel challenged the juror for cause, and, upon it being overruled, afterwards excused him upon peremptory challenge. This is claimed to be error. The mere fact that the juror was in the employ of another street railway company, without a showing as to what that employment was, affords no reason, on its face, for excusing the juror for cause. The disqualification could only arise upon some showing of fact from which a fair inference could be drawn that his duty as a juror in the case would clash with his duty to the company, or that his relations to the company were such as to be likely to bias his judgment. No such showing was made. But, admitting that the juror was disqualified, under the rule laid down in *Pool v. Milwaukee Mechanics Ins. Co.* 94 Wis. 447, and *Spies v. People*, 122 Ill. 1, it is not prejudicial error to

overrule a challenge for cause unless it is shown that an objectionable juror was forced upon the party, and sat upon the case, after such party had exhausted his peremptory challenges.

The errors as to the admission of evidence are so trivial and so unsubstantial that counsel were content, in their brief, to simply refer us to the page in the case where the alleged objectionable evidence could be found. This contention is based largely, if not wholly, upon the ground that the questions were leading. This matter is so largely in the discretion of the trial judge that this court will not interfere except in cases of manifest abuse. No such instance is here presented.

Complaint is made that the court refused to submit a question of whether or not the injury to appellant was of a permanent nature. There was no dispute in the evidence as to the nature and character of plaintiff's injuries. All the testimony on that subject came from the plaintiff and his medical attendants. It had no significance except as it bore on the amount of recovery. The judge charged the jury that in estimating damages they should make allowance for the pain and suffering appellant was reasonably certain to endure hereafter, for the deformity of his leg, and the depreciation of his capacity to earn a livelihood in the future. The testimony being all one way as to the character of his injuries, it is not easy to perceive how he has been wronged by a failure to require the jury to make a special finding on that subject. Questions in a special verdict are only designed to cover contested issues. *Murphey v. Weil*, 89 Wis. 146; *Hart v. West Side R. Co.* 86 Wis. 483.

We have carefully reviewed the verdict submitted, and are satisfied that it fairly covers the issues made by the pleadings and proofs. The negligence complained of arose from the fact that the motorman or conductor, without notice or warning, caused the car to start with a sudden jerk,

while appellant was attempting to alight therefrom. The jury found that the motorman did not know, and ought not in the exercise of proper care to have known, that appellant was getting off the car. The motorman being in charge of the motive power of the car, this finding disposes of so much of defendant's negligence as arises from the alleged *negligent* starting of the car. There being no pretense that the conductor signaled for the car to start, the only other element of negligence arises from the failure to warn. That duty presumably lay upon the conductor. The jury found, under proper instructions, that the conductor was guilty of negligence which proximately caused the injury. His negligence, therefore, must have consisted in the failure to give notice or warning to the passenger about to alight. No other theory is tenable, either from the pleadings or proof. The jury further found that the car came to a full stop, and that the appellant had reason to believe that it would stop, a sufficient length of time to enable him to alight with safety, if he used ordinary care. By the failure of the conductor to do his duty, he was induced to make the attempt to leave the car, and upon this the liability of the defendant must be predicated. But the jury went further and found that appellant failed to exercise ordinary care in attempting to alight, which contributed to produce the injury he received. It requires no argument or citation of authorities to show that, if this finding is supported by the evidence, no recovery can be had. Whether or not a person has used ordinary care in a given case depends upon a great variety of circumstances of time, place, knowledge of conditions, acts of the party, and the like, which bear upon and give character to his conduct. It requires a full survey of all existing conditions from which an inference of fact may arise, and, unless such inference is conclusive, it becomes the duty of the jury to pass upon the facts and arrive at a result. The jury did so in this case, under full and proper

instructions, and the result reached finds ample support in the testimony, and therefore precludes a recovery.

In cases where special verdicts are submitted, the practice of attorneys in requesting instructions only applicable when a general verdict is required ought not to be encouraged. The law does not contemplate, nor proper practice require, the trial court to submit instructions as to the general duty or liability of the parties. The very purpose of a special verdict is to have the jury find the facts, to which the court will apply the law on the motion for judgment. Only such instructions as to the law should be given as will enable the jury to understand and properly answer the interrogatories submitted. Proper practice would seem to demand that instructions submitted in such cases should be directed to specific questions asked, and not to the case generally, as when a general verdict is submitted. It not unfrequently happens that the giving of general instructions would advise the jury of the effect their answers would have upon the judgment,—a result well calculated to defeat the very purpose of a special verdict. *Ryan v. Rockford Ins. Co.* 77 Wis. 611. These remarks are called forth by the contention of counsel that certain instructions requested were not submitted. Each of the instructions requested was repugnant to the practice stated. So far as applicable, however, the trial court seems to have substantially submitted the instructions requested. *Klatt v. N. C. Foster Lumber Co.* 97 Wis. 641.

Criticism is made that the court erred in his instructions to the jury wherein he said that street railways were responsible for negligence of their agents with respect to the management of their cars, "if any injury ensues therefrom, and the passengers themselves are *without fault.*" Standing by itself this clause would be subject to the criticism offered, but, when construed with the other portions of the charge, it becomes harmless. It is further rendered quite inoffensive

by the findings of the jury. The court fully instructed the jury as to the passenger's duty in subsequent portions of the charge, and under the rule that the charge must be construed as a whole, it is not perceived how any injury resulted to the appellant.

The contention that the verdict is inconsistent cannot prevail. The main questions involved related to the negligence of the respective parties, and upon which the findings are full and complete. The finding that appellant was guilty of negligence which proximately contributed to the injury sustained, receiving support from the evidence, and the trial court having passed thereon, this court does not feel at liberty to disturb such decision.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

---

99 40
102 645

FRANEY, Appellant, vs. THE WAUWATOSA PARK COMPANY, imp., Respondent.

MALONEY, Appellant, vs. SAME, Respondent.

March 2 — March 22, 1898.

Election of remedy.

In an action against a corporation and its promoters to recover moneys which the plaintiff was induced to pay for stock by the false representations of such promoters as to the price of certain land that was conveyed by them to the corporation, judgment was rendered against the promoters but not against the corporation, but on appeal by the promoters the judgment was reversed on the ground that the plaintiff's contract to buy stock could not be rescinded as to the promoters and affirmed as to the corporation, and on filing the *remittitur* the plaintiff recovered of the promoters the amount due from them on an accounting for the profit they had made by charging the corporation an excessive price for said land. He then appealed from the judgment in favor of the corporation. *Held*, that he had elected his remedy and affirmed his contract to buy stock.

APPEALS from judgments of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

The facts in the cause are stated in the opinion.

N. S. Murphey, for the appellants, argued, among other things, that the promoters were the authorized agents of the corporation, and it is chargeable with their fraudulent representations by means of which subscribers to the stock were obtained. Cook, Stock, §§ 140, 145, 356; *Capel & Co. v. Sim's Ship Composition Co.* 58 L. T. Rep. (1888), 807; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268; *U. S. v. State Bank*, 96 U. S. 36; *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532; *Skinner v. Merchants' Bank*, 4 Allen, 290.

For the respondent there was a brief by *Lyman G. Wheeler*, and oral argument by *Mr. O. T. Williams* and *Mr. Wheeler.*

CASSODAY, C. J. It appears from the record: That November 1, 1891, one Benjamin Seigert was the owner and in possession of twenty-seven and three-elevenths acres of land described, and was willing to sell the same for $1,200 per acre,— that is to say, for $32,727.27. That about the middle of November, 1891, he made a contract with the defendant Edgar E. Warner to sell the land to him for that price. That thereupon the defendants Edgar E. and Arthur W. Warner and John S. Wambold, with the purpose of purchasing the land at that price and selling the same to the defendant corporation to be thereafter formed, drew up a subscription to the following effect, with the description of the land omitted: "We, the undersigned, hereby subscribe the amount set opposite of our respective names in a corporation to be formed and known as the *Wauwatosa Park Company* for the purchase and selling of the following property . . . for the sum of $45,000, and agree to pay for the same as follows:" One third or more of the amount

subscribed in cash within thirty days from the date of subscription, the balance within five years from said date, with interest on deferred payments at six per cent., payable semi-annually. That thereupon Edgar E. Warner signed such subscription for the amount of $10,500, but neither Arthur W. Warner nor Wambold signed the same, but it was signed by other persons, including the plaintiff *Franey* for $3,000, and the plaintiff *Maloney* for $500, so that the total amount, with the subscription of Edgar E. Warner, was $54,500. That December 9, 1891, in pursuance of the purpose mentioned, the two Warners and Wambold did prepare, sign, and acknowledge, and cause to be filed, as required by the law, articles of incorporation of the defendant park company, with a nominal capital of $45,000, divided into shares of $100 each, for the purchasing, holding, leasing, and selling, and dealing in real estate, and doing all things necessary, incident to, convenient, or desirable in or about said business.

It further appears: That January 7, 1892, the defendants Edgar E. and Arthur W. Warner and Wambold convened, and elected themselves and others a board of directors. That on the same day such directors held a meeting, and elected Wambold president, Arthur W. Warner vice-president, and Edgar E. Warner secretary and treasurer, of the corporation for the then ensuing year. That the defendants caused the whole amount of the capital stock of the corporation — that is to say, $45,000 — to be issued to various persons, some of whom were subscribers, and some of whom were not subscribers, and, among others, to Edgar E. Warner $4,382, to Arthur W. Warner $1,409, and to John C. Wambold $1,409, each for full-paid stock, no consideration being paid therefor by either of them, or, if paid, then they were, respectively, paid out of the moneys realized by them, and unlawfully appropriated to their own use in the amount of the difference between $45,000 and $32,727.27. That January 14, 1892, the plaintiff *Franey* paid the defendant park

company, upon his subscription, $1,000 in cash, and July 1, 1893, the further sum of $120, and received in return therefor three certificates of stock in the company, each for ten shares of the capital stock of the company, signed by Edgar E. Warner, secretary, and John C. Wambold, president, certifying that one third of the same had been paid to the company. That January 22, 1892, the plaintiff *Maloney* paid to the park company upon his subscription $500, and received in return therefor a certificate of stock in the company for five full-paid shares of the capital stock, signed by Edgar E. Warner as secretary and John C. Wambold as president, certified to be full-paid stock. That February 27, 1892, Benjamin Seigert, as owner of the land mentioned, conveyed the same to the defendant *Wauwatosa Park Company*, the deed reciting a consideration of "$1.00 and other valuable considerations." That April 10, 1895, the plaintiffs *Franey* and *Maloney* respectively gave notice to all of the defendants that they elected to rescind their contracts of subscription to purchase the land and to the stock of the corporation on the ground that the same were entered into by them in pursuance of the false and fraudulent representations made by the defendants, and then and there demanded the repayment of the moneys so paid by them, respectively, with interest, and the return to the plaintiff of the contract of subscription, and therein offered to reconvey, assign, and deliver to the defendants, or either of them, the several certificates of stock, to the end that the contract might be canceled and held for naught; which demands and offers were then and there refused by the defendants, respectively.

On April 16, 1895, the plaintiff *Franey* commenced an action against the park company and the two Warners and Wambold for the rescission of such contract, and to recover back the $1,120 so paid by him, and interest thereon from the times of payment; and on the same day the plaintiff

Maloney commenced an action against the same defendants for the rescission of such contract, and to recover back the $500 so paid by him, and interest thereon from the time of payment. The Warners and Wambold answered, and the park company separately answered.

At the close of the trial the court found, in effect, that such subscriptions and payments thereon by *Franey* and *Maloney*, respectively, were procured by the false representations and fraud of the two Warners and Wambold; that the defendant the *Wauwatosa Park Company* was properly made a party defendant therein, but that it was not responsible for the frauds practiced upon the plaintiffs, respectively, by the other defendants above named, and did not participate therein; and that this suit, as to the said corporation, could not be maintained for the recovery of damages against it.

As conclusions of law the court found, in effect, that Edgar E. Warner and Arthur W. Warner and Wambold were promoters of the corporation in the matter of the organization thereof, and were agents of the corporation in the matter of the purchase of the land; that both of such relations were trust relations; that they had no right to make any profit out of the purchase of the land, and that the profits so made by them were so made in fraud of their trusts, and contrary to equity and good conscience; that the plaintiffs *Franey* and *Maloney*, respectively, were entitled to judgment rescinding the contract of subscription to purchase the land, and to the stock of the corporation, upon reassigning to Edgar E. and Arthur W. Warner and Wambold their interests in the several certificates, and filing the same with the clerk of the trial court, and also to recover the moneys so paid by *Franey* and *Maloney*, respectively, with interest from the times of such payments, with costs and disbursements of the action; and that as to the defendant the *Wauwatosa Park Company*, the action be dismissed without costs to either party.

From the judgment entered thereon accordingly, the defendants Edgar E. and Arthur W. Warner and Wambold appealed to this court, and the same was reversed on the ground that the contract could not be rescinded as to such promoters and at the same time affirmed as to the park company. *Franey v. Warner*, 96 Wis. 222. Upon the *remittitur* being filed, and the opinion and judgment of this court therein, the trial court, on or about June 17, 1897, on motion of *Franey's* attorney, directed judgment to be entered in his favor against Edgar E. and Arthur W. Warner and Wambold for $851.47, with interest thereon at six per cent. from April 16, 1895, and judgment was thereupon entered accordingly, and such judgment was fully paid and satisfied September 2, 1897. The trial court, on like motion of *Maloney's* attorney, on or about June 19, 1897, directed judgment to be entered in his favor and against Edgar E. and Arthur W. Warner and Wambold for $141.91, with interest thereon at six per cent. from April 16, 1895, and judgment was thereupon entered accordingly, and such judgment was fully paid and satisfied September 2, 1897.

On June 22, 1897, the plaintiff *Franey* and the plaintiff *Maloney*, respectively, appealed from so much of such original judgment entered September 18, 1896, as was in favor of the park company, and dismissed the actions, respectively, as against that company.

The subscription to the capital stock in the corporation to be formed for the purchase and sale of the land, although voidable, as having been procured by fraud and false representations, yet was not absolutely void. It is well established that a party who seeks to rescind a contract or transaction on the ground of fraud must do so *in toto;* that he cannot affirm it in part and disaffirm it as to the residue. *Weed v. Page*, 7 Wis. 503; *Hendricks v. Goodrich*, 15 Wis. 679; *Hollenback v. Shoyer*, 16 Wis. 499; *Grant v. Law*, 29 Wis. 99; *Hyslip v. French*, 52 Wis. 516; *Friend Bros. Clothing Co. v. Hulbert*, 98 Wis. 183.

The three promoters, Edgar E. and Arthur W. Warner and Wambold, purchased the land, and had it conveyed by Seigert to the park company. On the trial the court found that the park company was not responsible for the frauds practiced upon the respective plaintiffs by the promoters, and that the park company did not in any manner participate in any of such frauds; and hence the judgment dismissed the action as against the park company, and to that extent affirmed the contract and the validity of the stock. Nevertheless, the judgment retained the action as against the promoters, and rescinded the contract of subscription and to the stock. The promoters appealed to this court from that part of the judgment against them, and it is to be regretted that the respective plaintiffs did not appeal at the same time, so that the whole matter might have been before this court, and considered upon the merits, and wholly disposed of at the same time, according to the rights and equities of the respective parties. By such failures of the plaintiffs to so appeal, this court, when the case was here before, assumed, and was necessarily bound to assume, that the respective plaintiffs acquiesced in so much of the judgment as affirmed the contract and transaction by dismissing the action as against the park company, and so we were compelled to reverse the only part of the judgment over which we had jurisdiction on that appeal, because it undertook to rescind the contract of subscription and to the stock, and still leave the title to the land in the park company. Nevertheless, we held, in the language of Mr. Justice MARSHALL, in effect, that "the complaint states a cause of action in equity for an accounting, and a recovery of profits retained by the promoters, which, in justice and equity, belong to plaintiff, and that the allegations in that regard are fully covered by the findings of fact;" that the plaintiff was entitled to recover, upon the principle "that, if a person in good faith brings an action in equity, alleging facts sufficient to constitute a good cause of action within some recognized principle of

equity jurisprudence, but fails to establish some fact essential thereto, yet does establish a state of facts entitling him to some relief by way of damages or otherwise, the court will not dismiss the bill, and thereby render further litigation necessary, but will retain it, and render such judgment as will do complete justice between the parties." *Franey v. Warner*, 96 Wis. 222. Such ruling was necessarily an affirmance of the contract and the validity of the stock held by the respective plaintiffs. They each acquiesced in such decision by moving for and obtaining judgment in their favor as therein directed. Having obtained the full benefit of such judgment in their favor, they now seek to reverse the other branch of the judgment, and have us hold that the contract and stock certificates were rescinded, and that they can recover back the balance of the money they respectively paid, and interest.

We are clearly of the opinion that by such acquiescence and conduct on the part of the plaintiffs they have each elected to affirm the contract of subscription and the validity of the stock, and such election is conclusive upon them on this appeal. We refer only to a few of the numerous adjudications bearing upon the question. "Where an action has been brought for part of the items of a running account, omitting other items of the same account which were due at the time, and judgment has been recovered therefor, such judgment is a bar to another action afterwards brought to recover for the items so omitted." *Borngesser v. Harrison*, 12 Wis. 544; *S. C.* 78 Am. Dec. 757. "A judgment defendant is estopped from alleging that usurious interest was included in the judgment in a subsequent suit to recover treble the amount of such interest." *Heath v. Frackleton*, 20 Wis. 320. It is a maxim of the law that "a man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times on the truth of each of two conflicting allegations, according to the promptings of his

private interests." Broom, Leg. Max. (7th ed.), 168; *Kaehler v. Dobberpuhl*, 60 Wis. 261. "The rule is universal that where a party has the choice between two inconsistent remedies or causes of action, and he deliberately adopts the one, such election becomes conclusive upon him, and precludes him from subsequently adopting the other." *Warren v. Landry*, 74 Wis. 151, and cases there cited. Of course, the party so electing must know all the facts. So, in a later case, it has been held that "an action *ex contractu* to recover money paid by a bank to defendant, and alleged to have been had and received by him to the use of plaintiff, is an election to ratify and affirm the payment, and precludes a subsequent action to recover the money from the bank on the ground that such payment was unauthorized." *Crook v. First Nat. Bank*, 83 Wis. 32.

To rescind a contract or transaction is certainly inconsistent with the recovery of damages or loss of profits by reason of fraud in obtaining the contract or transaction. By accepting of such damages or profits, the respective plaintiffs put themselves in substantially the same position they would have been in had they originally joined the three promoters in the purchase and sale of the land and division of the profits. "The ratification by one of the unauthorized act of another operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification." *Cook v. Tullis*, 18 Wall. 332. To the same effect, *Bolton Partners v. Lambert*, 41 Ch. Div. 295. Upon the question of a party being bound by his election of remedies, see, also, *Wirth v. Bartell*, 89 Wis. 596, and cases there cited.

By the Court.— The portions of each of the two judgments of the circuit court appealed from are affirmed.

MOODY & MECKELBURG COMPANY, Appellant, vs. TRUSTEES OF THE METHODIST EPISCOPAL CHURCH OF PORT WASHINGTON and others, Respondents.

March 2 — March 22, 1898.

Agency: Lien of materialman: Ratification of contract: Religious corporation.

1. A pastor of a church who transacted the entire business of having the church building repaired and remodeled, with the knowledge of the church corporation and its trustees, without any objection on the part of either, must be deemed their agent in respect to such matter, upon whom, under sec. 3315, R. S. 1878, service of a notice of a subcontractor's lien may lawfully be made.
2. Where the pastor of a church, acting as its agent, though without authority, made a written contract for the repair and remodeling of the church building, and superintended the work, and the members and trustees of the church corporation, with full knowledge of the facts, made no objection to his acts, but subsequently approved thereof by partly paying for such improvements and accepting and using the building, *held*, that his contract must be regarded as effectually ratified.
3. A corporation may ratify the unauthorized act of one claiming to be its agent as well as may a natural person.
4. The pastor, not being a trustee, does not, by merely acting as such agent, incur any personal liability.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed in part; reversed in part.*

This is an action to enforce a materialman's or subcontractor's lien upon a church building. The action was tried by the court, and the facts are not materially in dispute.

It appeared that the defendants' church building was remodeled in the year 1893 by the defendant Parsons as principal contractor, the work being finished about September 18, 1893. The plaintiff corporation furnished building materials to Parsons to be used in the building, and which in fact went into the building (except a few small items), amounting to

$705.60, the last item being furnished September 18th, and no part of the amount has been paid. The defense was that the trustees of the church never made or authorized any contract with Parsons for the work, and that the sixty-day notice required by sec. 3315, R. S. 1878, was never served upon the trustees or their agent. Upon these issues it appeared that there were four trustees of the church, and that the defendant *Leek* was the pastor of the church; that no contract was made by the trustees; but that *Mr. Leek* and one Coe, acting for the church, made a written contract with Parsons for the remodeling of the church without specific authority so to do from the trustees. The work went on under the contract, numerous changes being made from time to time, all under the direction of *Leek*, who acted as superintendent on behalf of the church. The work occupied from May until September, and the congregation worshiped in the basement during that time. The trustees attended church, and knew of the work, and made no objection. The work was practically done September 21, 1893, and the church was then dedicated. Difficulties then arose as to payment. The church found it hard to raise money. In November it appears that the trustees gave a mortgage on their parsonage for $500 to pay a part of the indebtedness for remodeling, but there was still a considerable amount left due. In October or November a meeting was arranged between the creditors and the trustees and *Leek*, and efforts were made to settle with all creditors. Plaintiff's representative was present at the meeting, and its claim was recognized, and an agreement was made in writing to settle at eighty cents on the dollar. This agreement was signed by all the creditors, and by four men acting for the church, of whom at least two were trustees; but it was never carried out. It is uncertain whether this meeting was a valid meeting of the trustees or not. The plaintiff demanded the production of the records of the corporation on the trial, but they were not produced.

On the 6th of November, 1893, the plaintiff caused to be served upon *Mr. Leek* a sufficient notice, claiming a subcontractor's lien, but he did not hand it to the trustees until two or three months later. Afterwards this action was commenced against *Leek* and the trustees and Parsons.

The court found that the materials were furnished to be used in rebuilding the church, but that no notice of the plaintiff's claim for a lien was served on the trustees within the time required by law, and that said trustees had no agent; also, that *Leek* was not a trustee, and never became personally liable therefor,—and judgment was rendered dismissing the complaint, with costs, as to *Leek* and the trustees, and awarding a personal recovery in favor of the plaintiff against Parsons for the amount of its claim, with costs.

The plaintiff appealed from the entire judgment, except that part in its favor against Parsons.

J. A. Eggen, for the appellant.

For the respondents the cause was submitted on the brief of *Wm. M. Foster*, attorney, and *W. J. Turner*, of counsel. Among other things, they argued that the plaintiff could not be a subcontractor, there being no contract between the trustees and the principal contractors. Phillips, Mechanic's Liens, sec. 44; *McGinniss v. Purrington*, 43 Conn. 143, 147. The church corporation is not bound by the acts of its trustees unless they were convened at an authorized official meeting, held pursuant to a call addressed to all. *United Brethren Church v. Vandusen*, 37 Wis. 54; *Doyle v. Gill*, 59 id. 518, 520; *Leonard v. Lent*, 43 id. 83, 88.

WINSLOW, J. The claim on behalf of the church is (1) that the trustees never made any contract with Parsons, and hence that Parsons was not a principal contractor; and (2) that *Leek* was not its agent, so that valid service of the notice of the plaintiff's claim for lien could be made upon him. Both of these claims we regard as untenable.

It seems to be true that Parsons did not originally contract with the trustees, but the evidence abundantly shows that the trustees ratified the contract made by *Leek*. A corporation may ratify the unauthorized act of one claiming to act as its agent, as well as a natural person, and such ratification, when made with knowledge of the facts, operates as though previous authority had been given. Mechem, Agency, §§ 158, 167; *Kickland v. Menasha Wooden Ware Co.* 68 Wis. 34. We regard the acquiescence of the corporation and its trustees in the acts of *Leek*, and the subsequent approval thereof by partially paying for the improvements and accepting and using the building with full knowledge of the facts, as an effectual ratification of *Leek's* transactions with Parsons.

Nor can it be doubted that *Leek* was the agent of the church in the matter of the rebuilding, within the meaning of sec. 3315, R. S. 1878, so that valid service of the subcontractor's claim for a lien could be made upon him. *Leek* was not only the pastor of the church, but transacted the entire business from start to finish, without objections from the church corporation or from the trustees individually. It was not necessary that he have a power of attorney in writing.

These considerations require a reversal of the judgment so far as the church is concerned. No personal liability on the part of *Leek* was shown, however, nor was he a trustee of the church; hence the judgment was right as to *Leek*.

By the Court.— That part of the judgment dismissing the complaint as to *Leek* is affirmed, without costs; that part of the judgment dismissing the complaint as to the trustees is reversed; and the action is remanded, with directions to enter judgment for a lien in accordance with the prayer of the complaint.

B. HOFFMANN MANUFACTURING COMPANY, Respondent, vs. WESTERN STOVE & MANUFACTURING COMPANY, Appellant.

March 2 — March 22, 1898.

Appeal on questions of fact.

The decision of the trial court upon questions of fact cannot be disturbed on appeal unless contrary to the clear preponderance of the evidence.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders.*

For the respondent there was a brief by *Sylvester, Scheiber, Riley & Orth*, and oral argument by *C. A. Orth.*

MARSHALL, J. This is an appeal from an order sustaining an attachment. It involves solely the question of whether the trial court decided correctly, from the evidence, on questions of fact. The rule in such cases is that the decision of the trial court cannot be disturbed unless contrary to the clear preponderance of the evidence. The record has been carefully tested by that rule without discovering any sufficient reason for reversing the action of the trial court. It is not considered advisable to do more than state the conclusion to which we have arrived. The case is governed by a rule so well established that a discussion of it, or of the evidence calling for its application, will be of no value in future litigation.

By the Court.— The order of the superior court is affirmed.

99 54
102 327
99 54
106 489
99 54
109 184
99 54
110 1551
99 54
114 1413

LIMITED INVESTMENT ASSOCIATION, Respondent, vs. GLENDALE INVESTMENT ASSOCIATION and another, imp., Appellants.

March 2 — March 22, 1898.

Vendor and purchaser: Fraud in sale: Election of remedies: Action for money had and received: Review on appeal: Instructions.

1. The agent of the vendor of land, who had acquired the right to buy such land at a certain price, and who was also one of the promoters of a corporation organized to buy such land, sold the same to such corporation at a price which he represented to be the price to be paid to the vendor, but which in fact included a large commission to be paid to himself. The vendor, with full knowledge of the facts, conveyed the land to such agent and he to the corporation; and the vendor, on receiving payment for the land, paid such agent his commission. *Held*, that the transaction was a fraud upon the corporation, and that it might exercise an option, on tendering back the property received, to rescind the contract and compel the vendor to refund the consideration paid by it. *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345; *Franey v. Warner*, 96 Wis. 222; and *Hebgen v. Koeffler*, 97 Wis. 313, followed.
2. Where, in such a case, the corporation elected to rescind the contract and sue for the consideration paid, instead of suing for damages for the fraud, it was bound by such election.
3. An action to recover the consideration paid, in such a case, is really one on an implied promise to pay back money had and received, the basis of which is the loss to the plaintiff and the consequent enrichment of the defendant; and where, in such an action against the vendor and his agent, it appears that the money was paid to the vendor for his sole use, and that the only benefit the agent derived from it was his commission paid by the vendor, such agent cannot be held liable, but the plaintiff must look to the party to whom it paid the money.
4. Although the complaint in such an action charges a conspiracy between the defendants to defraud the plaintiff, yet, where the special verdict substantially covers the facts necessarily involved in the case, a finding as to whether such a conspiracy existed is unnecessary, that being but a legal conclusion from the facts found.
5. The objection that there was no finding as to such a conspiracy will not avail on appeal, where the party objecting did not ask for such a finding, nor save an exception to the failure of the court to submit that question.

6. An instruction that, to enable the jury to answer the questions submitted to them correctly, they might take into consideration the allegations of the complaint that there was an agreement between the defendants to defraud the plaintiff, is not objectionable, where it is evident, taking it in connection with the whole charge, that what the court intended was that they might do so to determine in what manner it was charged that such agreement had been made.

APPEALS from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed on one appeal; reversed on the other.*

Prior to 1892, the *Glendale Investment Association* was the owner of a certain twenty-acre tract of land in Milwaukee county. John H. Meyers was its secretary, a director, and had practical management and control of its affairs. The defendant Clayton had desk room in Meyers' office, and at different times acted as agent for him and for the companies in which he was interested, in selling land on commission. Some time in July, 1892, Clayton had a talk with Meyers about getting the sale of this twenty-acre tract on commission. The matter was submitted to the directors of the *Glendale Investment Association*, and authority given him to sell the land at $2,700 per acre; Clayton to have a commission of $200 per acre. Some time in September, Clayton arranged with defendant *Griffin* and one Pollock to organize a corporation to purchase this land, and he agreed to divide his commission with them. Meyers was informed of the negotiations as they progressed. During September, *Griffin* and Pollock secured subscriptions to the stock of the corporation to be formed; and on September 28th a meeting was held, the plaintiff corporation was duly organized, and Clayton and *Griffin* were elected directors and officers of the company, Clayton being secretary and *Griffin* treasurer. They were each subscribers to five shares of the capital stock, but it was understood that Clayton need not take the

stock he had subscribed for, and nothing was ever paid by him. On the same day, the corporation appointed Clayton and its president a committee to purchase the land at the price mentioned, but Clayton conducted the trade by himself. Clayton told Meyers the corporation had been formed to purchase the land at the price stated, and that he was authorized to purchase it for them, and asked him to make out the contract.

On October 1st, when the contract was presented to Clayton to execute, he first learned that it had been executed in his name. He then executed the same, duly assigned it to the corporation, and the first payment was made by plaintiff. While the stock subscriptions were being received, the most of the subscribers were informed that they were all going in on equal terms. The price of the land was represented to be as named in the contract, and no disclosure was made at the meeting of the subscribers that a commission was to be paid. Payments were made by the plaintiff upon the contract, from time to time, until the sum of $10,292.54 had been paid and credited on the books of the *Glendale Company* to the plaintiff company. The commission, amounting to $4,000, was paid to Clayton by the *Glendale Company*, and by him divided with *Griffin*.

In June, 1894, the plaintiff first learned of the transaction regarding commissions. A meeting of the association was called, and it was then decided to take steps to rescind the contract. Proper proceedings were then taken, and a tender of a deed and an assignment of the contract was made to Clayton and the *Glendale Company*, and a demand for the money paid was made and refused. This action was then commenced against the *Glendale Investment Association*, Clayton, and *Griffin* to recover the money paid on the contract.

The complaint sets out the facts substantially as stated, and the prayer for relief is for the recovery from all of the

defendants of the money so paid. The action was tried before a jury, who rendered a special verdict, upon which judgment was rendered for the plaintiff, and against all of the defendants, for the recovery of the amount plaintiff had paid on the contract, with interest. Defendants *Griffin* and *Glendale Investment Association* bring separate appeals.

For the appellants there were separate briefs by *Austin & Fehr*, attorneys for the *Glendale Investment Association*, and *Timlin & Glicksman*, attorneys for the defendant *Griffin*, and oral argument by *W. H. Austin*.

For the respondent there was a brief by *Hoyt, Ogden & Olwell*, and oral argument by *F. M. Hoyt*. To the point that, where a vendor negotiates a sale of property through his agent, who is at the same time the agent of the purchaser, and such vendor pays a secret commission to the agent for making the sale, the purchaser, on learning the facts, may tender back what he has received and recover back from the vendor and the agent, as joint tortfeasors, the money paid by him, they cited Mechem, Agency, §§ 797, 798; *Meyer v. Hanchett*, 39 Wis. 419; 1 Am. & Eng. Ency. of Law (2d ed.), 1178; *McDoel v. Ohio Valley Imp. & Cont. Co.* 36 S. W. Rep. (Ky.), 175; *Panama & S. P. Tel. Co. v. India Rubber, G. P. & T. W. Co.* L. R. 10 Ch. App. 515; *Atwool v. Merryweather*, L. R. 5 Eq. 464, note; *Munson v. S., G. & C. R. Co.* 103 N. Y. 74.

BARDEEN, J. The law bearing upon the rights, duties, and obligations of promoters of corporations has been so fully covered and exhaustively discussed in the recent cases of *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345; *Franey v. Warner*, 96 Wis. 222; *Hebgen v. Koeffler*, 97 Wis. 313, as to render it unnecessary at this time to do more than to refer to those cases.

In this case, the facts as found by the jury, and which are fully supported by the evidence, are substantially that the

Glendale Investment Association was the owner of a certain tract of land, which it authorized Clayton to sell for $2,700 per acre, and upon which it was to pay a commission of $200 per acre. Clayton, with full knowledge of the company, associated himself with *Griffin* and Pollock in the capacity of promoters, for the purpose of organizing a corporation to purchase this land. The plaintiff corporation was formed, Clayton and *Griffin* were elected directors and officers, and the land was purchased at $2,700 per acre; *Griffin* and Clayton carefully withholding any information from most of the subscribers for stock that they were to receive a rebate of $200 per acre for their mutual benefit. The defendant *Glendale Investment Association*, knowing of the organization and purpose of the corporation, and of the relation Clayton sustained to it, helped on the deal, but, in order to clear its skirts, makes its contract to Clayton, and advises the assignment of it to the corporation. It then receives the money of the corporation, and forthwith returns to Clayton some $4,000 in alleged commissions. That this was a fraud upon plaintiff seems too clear for argument. As soon as these facts came to the surface, plaintiff tendered back what it received, and demanded its money. Upon the refusal to pay, plaintiff made its election to recover back the consideration paid. It might have chosen other remedies, as are pointed out in the *Franey Case;* but, having elected to stand upon a rescission of the contract, it is bound thereby.

An inspection of the complaint and the proceedings upon the trial lead at once to the conclusion that this action is based upon implied assumpsit, and is really an action for money had and received. Such being the case, it becomes important to inquire whether the recovery against the defendant *Griffin* can be maintained. The rule is quite elementary that, to enable a person to maintain an action for money had and received, it is necessary for him to establish that the persons sought to be charged have received money

belonging to him or to which he is entitled. That is the fundamental fact upon which the right of action depends. *National Trust Co. v. Gleason*, 77 N. Y. 400. The purpose of such an action is not to recover damages, but to make the party disgorge; and the recovery must necessarily be limited by the party's enrichment from the alleged transaction. Evidence of crooked dealing or fraudulent practices is only important in determining the plaintiff's right to secure the fund. While it may be admitted that all the defendants were joint tortfeasors, to the extent that they would be jointly liable for all *damages* the plaintiff has sustained by reason of their fraud, yet, when it is sought to render them liable on *quasi* contract, a different rule prevails. The basis of recovery in the latter case being a loss on one side and a consequent enrichment on the other, liability can only exist in so far as these elements concur. There is no implied promise to pay damages. The promise that the law implies is that the guilty party will restore that which he has received, and which the other has shown himself entitled to. To the extent, therefore, which it is shown that the one party has suffered loss and the other gained profit, can the recovery in this form be sustained. The law does not imply a promise to pay for something the party has not received, while in the case of the tort it casts upon him an *obligation* to pay all damage done, regardless of a promise.

Applying these observations to the facts before us, we find that every dollar of the money sought to be recovered in this action was paid to the defendant *Glendale Investment Association* by the plaintiff. Not one cent was paid to *Griffin*, or came to his pocket, except as it came through the *Glendale Company* to Clayton, and then to him. The amount received by *Griffin* was but a small fraction of the money paid by plaintiff to the *Glendale Company*. Plaintiff, suing as for a rescission of its contract, and upon the im-

plied promise to restore that which has been taken from it, is bound to look to the one to whom it paid the money. Cases may and do occur where the money sought to be recovered was received by one for the benefit of others, and where all interested in the fund would be jointly liable. But this is not such a case. The money paid by plaintiff to the *Glendale Company* was not paid for or on behalf of *Griffin*. It was paid on the contract, and as part of the purchase money of the land conveyed. There was no contract between plaintiff and *Griffin* to rescind, and hence no implied obligation can arise between them. The entry of judgment against *Griffin* for the full amount paid on the contract by plaintiff was manifestly wrong, and must be reversed. As bearing upon the questions hereinbefore discussed, we cite *Barndt v. Frederick*, 78 Wis. 1; Keener, Quasi-Cont. 200–202; Alger, Promoters & Promotion, § 99.

Counsel for the *Glendale Investment Association* argue earnestly that the judgment as to it should be reversed, because there was no finding that there was a conspiracy or confederation among the defendants to defraud the plaintiff. Such a finding was not essential to the recovery. The special verdict, as we read it, substantially covers the *facts* necessarily involved in the case; and, if a conclusion that a conspiracy was essential to a recovery was needful, it was but a legal conclusion the court might draw from the facts found. Perhaps a better answer to this contention is found in the fact that this defendant did not request any such finding, and has failed to preserve any exception to the failure of the court to submit the question on that line, requested by the defendant *Griffin*.

The criticism of the charge of the court on this branch of the case is somewhat hypercritical. That portion to which especial exception is made is as follows: "And, to enable you to answer these questions correctly, you may take into consideration the allegation made in the complaint that

there was an agreement," etc. Read in connection with the entire charge, it is perfectly evident that what the court intended was that the jury might take the allegations of the complaint into consideration in determining in what manner it was *charged* that such an agreement or combination had been made, not that it tended in any manner to establish the fact.

We have carefully compared the charge given the jury with the requests submitted by the *Glendale Company*, and are well satisfied that the defendant has suffered no wrong. The facts proven tend to establish the justice of the conclusion arrived at, and leave the defendant without any just cause of complaint. The real basis of recovery rests upon the dealings between Clayton, the agent of said defendant, and at the same time a promoter and an officer of plaintiff, and the defendant corporation, through its secretary and general manager, Meyers. It is idle to say that this defendant or its secretary had no reason to believe that Clayton was not giving the actual purchaser the benefit of the commission allowed him. The fact is undisputed that the contract was for the full selling price of $2,700 per acre, and that the commission was not allowed to plaintiff in rebate of the contract price. It is also undisputed that the *Glendale Company* gave its checks from time to time to Clayton individually for the commission, and charged the amounts to its commission account. These facts, taken in connection with the situation and relations of the parties, speak loudly in favor of the conclusion arrived at. The true situation is fairly outlined by the verdict, and it ought not to be disturbed.

By the Court.—The judgment of the superior court of Milwaukee county, as to the defendant *Griffin*, is reversed; and, as to the defendant *Glendale Investment Association*, the judgment is affirmed.

99 62
116 127
60 LRA 400

PEEHL and husband, Respondents, vs. BUMBALEK and another, Appellants.

March 3—March 22, 1898.

Landlord and tenant: Renewal by holding over: Termination by notice.

1. Under the provisions of sec. 2187, S. & B. Ann. Stats., that if a tenant for a year or more holds over after the expiration of his term he may be considered a tenant from year to year, and that such tenancy may be terminated at the end of any year after the expiration of said term by giving not less than thirty days' prior written notice, such tenancy can be so terminated only at the end of some year after the expiration of the term.
2. A tenant under a lease for two years, with the privilege of three more if all are agreed, will be deemed to have renewed for the whole three years if he holds over after the expiration of his term and continues to pay rent.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The facts of the case are stated in the opinion.

For the appellants the cause was submitted on the brief of *Lenicheck, Koenitzer & Lenicheck.* They argued, among other things, that the original lease provided for no annual rental, but only for the payment of certain sums each month, and did not, therefore, create a tenancy from year to year, but merely one from month to month, and a holding over could not create a tenancy of a different kind. *Brown v. Kayser*, 60 Wis. 1; *Jackson v. Bradt*, 2 Caines, 169; *Rich v. Bolton*, 46 Vt. 64; *Skaggs v. Elkus*, 45 Cal. 154; *Blumenberg v. Myers*, 32 id. 93; *Bright v. McOuat*, 40 Ind. 521; *Hollis v. Burns*, 100 Pa. St. 206; *Steffens v. Earls*, 40 N. J. Law, 128; *Jones v. Willis*, 8 Jones, Law (S. C.), 430; *Hammon v. Douglas*, 50 Mo. 434; *Prindle v. Anderson*, 10 Wend. 391; *Coffin v. Lunt*, 2 Pick. 75; *King v. Grafton*, 83 Eng. C. L. 495, 18 Q. B. 496; *Wilkinson v. Hall*, 3 Bing. N. C. 508, 32 Eng. C. L. 237; Fox, Landlord & T. (2d ed.), 3; Taylor, Land-

lord & T. § 57; *Kellogg v. Citizens Ins. Co.* 94 Wis. 554. The renewal clause was void for uncertainty. It was silent as to term. It was also dependent upon an express agreement by both parties. Without a writing a renewal would be void.

For the respondents there was a brief by *Sylvester, Scheiber, Riley & Orth*, and oral argument by *C. A. Orth*.

CASSODAY, C. J. July 7, 1891, the plaintiffs leased to the defendants the premises described for the term of two years from August 1, 1891; the defendants "yielding and paying therefor the annual rent of $360, to be paid in even and equal portions on the 1st of every month up to May 1, 1893, then $35 per month for store up to the end of the lease, 1893. The small house in rear is $7 per month from May 1, 1892." The lease also contained this clause: "This lease is for two years from August 1, 1891, with privilege of three more if all are agreed, up to 1896." The defendants entered into possession of the premises, and remained in actual occupancy thereof until December 1, 1895, and during that time paid $42 rent monthly in advance. At the expiration of the original term of two years no new agreement or arrangement of any kind was entered into by or between the plaintiffs and defendants, but the defendants continued in possession upon the same terms and conditions provided for in the lease, and the plaintiffs acquiesced therein. October 29, 1895, the defendants, by an instrument in writing, notified the plaintiffs of their intention to quit the premises November 30, 1895, and on the last-mentioned day vacated the premises, and tendered to the plaintiffs the possession thereof. When the rent for December, 1895, became due, the plaintiffs brought an action for the same, and recovered, and the judgment therefor was affirmed by this court. *Bumbalek v. Peehl*, 95 Wis. 127. The defendants refused to pay the rent for January, February, March, April, May, June, or July, 1896, amounting in the aggregate to $294,

and so the plaintiffs commenced this action to recover the same.

Issue being joined and trial had, the court found, in effect, the facts stated. And as conclusions of law the court found, in effect, that after the expiration of the original term of the lease the defendants became tenants from year to year, and were liable for the rent thereof from January 1, 1896, to August 1, 1896; that the giving of the thirty-days notice of intention to surrender the premises, and the subsequent vacation of the same, did not terminate the defendants' tenancy of such premises, and that such tenancy did not terminate until August 1, 1896; that there was due and owing to the plaintiffs from the defendants for the seven months' rent mentioned at $42 per month, amounting in the aggregate to $294, with interest on the respective instalments from the dates given at six per cent. per annum,— and ordered judgment to be entered thereon accordingly. From the judgment so entered the defendants bring this appeal.

By the express terms of the lease, which was for two years, the defendants had the privilege of three more if all were agreed, up to 1896. There is nothing in the record to indicate that all were not so agreed. On the contrary, it appears affirmatively that the defendants willingly paid, and the plaintiffs willingly accepted, the rent for each month, as it became due, down to the giving of the notice by the defendants October 29, 1895.

Prior to 1885 the statute provided that "if a tenant for a year or more shall hold over after the expiration of his term, he may, at the election of his landlord, be considered a tenant from year to year, upon the terms of the original lease." R. S. 1878, sec. 2187. Under that statute this court held that, "as at common law, if a tenant for a year or more at a stipulated annual rent holds over after the expiration of his term, with the assent of the landlord, he becomes a tenant from year to year; and such tenancy can be terminated

against his will only by six months' notice ending with the current year;" and that the acceptance of rent at the rate specified in the lease from a tenant so holding over would be deemed an election by the landlord that the tenancy should be from year to year. *Brown v. Kayser*, 60 Wis. 1. After that decision the section was amended by adding this clause: "But such tenancy may be terminated at the *end* of any year after the expiration of said term, by either party to said lease, upon giving to the other party thereto, a notice in writing not less than thirty days prior to the date of such expiration, that he elects to terminate such lease at the end of such year." Laws of 1885, ch. 109 (S. & B. Ann. Stats. sec. 2187). But in the case at bar the defendants did not attempt to terminate such tenancy "at the *end* of any year after the expiration of said term" by giving notice as therein mentioned. The end of the year was August 1, 1895, and the notice was not given until October 29, 1895.

Besides, the lease may fairly be regarded as having been renewed for the whole three years by reason of the option therein given. *Kollock v. Scribner*, 98 Wis. 104.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

---

99 65
99 629

KANE, Executrix, Respondent, vs. WILLIAMS and another, imp., Appellants.

March 3 — March 22, 1898.

Appeal: Mortgage foreclosure: Judgment for deficiency: Guaranty.

1. A defendant in a foreclosure action who neither preserves any exceptions nor perfects any bill of exceptions, but bases his appeal entirely on the record, cannot, on such appeal, take any advan-

tage of the failure of the complaint to state facts entitling the plaintiff to a reformation of a discharge of the mortgage. Where, in such a case, the judgment is sustained by the findings, it will be conclusively presumed that such findings were based on sufficient and competent evidence, and that, if necessary, the pleadings were properly amended.

2. One who, on transferring notes and a mortgage, guarantees the payment of the notes, cannot claim to be released from liability by a release of the mortgage, which was given by mistake but has been reformed so that the mortgage is a valid lien on the property as against the owner.

3. That part of a judgment for the foreclosure of a mortgage which orders a judgment for a deficiency is an integral part of the judgment and is appealable.

APPEALS from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action to foreclose a mortgage. The mortgage was executed May 1, 1890, by the defendant *Stone* and wife to the defendant *Williams* to secure two notes executed by *Stone* for $2,500 each, payable one and two years from date, respectively, and covered twenty-four lots in certain subdivisions near the city of Milwaukee. The mortgage contained a provision for the release of the mortgaged lots from the lien of the mortgage upon the payment of $250 for each lot in certain blocks, and $200 for each lot in other blocks. June 7, 1890, *Williams* sold and assigned the mortgage to Jacob Nunnemacher, and on August 21, 1890, Nunnemacher sold and assigned the mortgage to one Alonzo L. Kane, both of which assignments were duly recorded. At the time of the last-named assignment the defendant *Williams*, for value received, made a written guaranty of the payment of the notes to Kane or his assigns at maturity, or at any time thereafter, and waived demand and protest and notice of demand or protest. May 20, 1892, Alonzo L. Kane sold and assigned the notes and mortgage to William H. Kane, the plaintiff's testator. A number of payments were made at various times as lots were sold by *Stone*, but, the

mortgage not being fully paid, William H. Kane commenced this action for foreclosure in December, 1894, against *Stone* and wife as makers and *Williams* as guarantor, and also against subsequent incumbrancers and purchasers.

The complaint alleged the execution and delivery of the notes and mortgage and the several assignments by which the plaintiff acquired title, and the guaranty by *Williams*. It also set forth the numerous payments made from time to time as lots were sold, and alleged that partial releases had been made upon such payments, and demanded the usual judgment of foreclosure and personal judgment against *Stone* and *Williams*. *Stone* answered, admitting the execution of the notes and mortgage, and the assignments, and his default in payment, but alleged that on January 24, 1891, Alonzo L. Kane executed and recorded a full release of the mortgage, and he claimed that the mortgage was no longer a lien upon the real estate. *Williams* answered separately, admitting the execution of the notes and mortgage and his guaranty; and also alleged the full release of the mortgage, and further claimed that the release was made without his knowledge, and that thereby the mortgage security was destroyed, and his guaranty released. There was also an answer by two defendants named Zimmerman, who purchased one of the lots after the recording of the alleged full release, and they alleged that they purchased the lot of *Stone* in good faith, relying upon the record of such release, and claimed that their lot should be declared free from the lien of the mortgage.

Upon the trial, *Stone* and *Williams* appeared by the same attorneys, Messrs. Kinne & Curtis, and the Zimmermans by Messrs. Howard & Mallory. The plaintiff made the usual proof of his mortgage by offering the instruments in evidence, and showed the amount left due thereon, and rested. Objections were made by the defendants to all of the papers introduced, upon the sole ground that the mortgage had

been satisfied and discharged of record. The defendants then proved by the register of deeds the recording on January 26, 1891, of the following instrument, which was duly witnessed and acknowledged:

"Alonzo L. Kane to *Festus T. Stone* and W. Satisfaction of Mortgage.

"Know all men by these presents that I, Alonzo L. Kane, of the city and county of Milwaukee, state of Wisconsin, do hereby certify and acknowledge that a certain mortgage, bearing date on the first day of May, A. D. 1890, made and executed by *Festus T. Stone* and Nellie A. Stone, his wife, to *Thaddeus W. Williams*, for $5,000, on lots ten (10) and eleven (11), block four (4), in Stone and Thomas' plat of Idlewild No. (2) two, section thirty-three (33), town eight (8), range twenty-two (22) east, Milwaukee county, state of Wisconsin, said mortgage having been assigned to Jacob Nunnemacher, and from him to Alonzo L. Kane, and recorded in the office of the register of deeds in and for Milwaukee county, in the state of Wisconsin, on the eighth day of May, A. D. 1890, at 12 o'clock p. m., in Volume 233 of Mortgages, on page 498, is fully paid, satisfied, and discharged. And the register of said county is hereby authorized to enter this satisfaction of record.

"In witness whereof, I have hereunto set my hand and seal this 23d day of January, 1891.

"ALONZO L. KANE. [Seal.]"

In connection with this release, it appeared in evidence that one Remington bought of *Stone* two of the mortgaged lots on the 24th of January, 1891, and that $500 of the price was paid, with *Stone's* knowledge, to Alonzo L. Kane, who then owned the mortgage, and that Kane then executed the instrument in question, and that it was recorded. It further appeared that Alonzo L. Kane was at the time of the trial incapacitated from testifying by reason of a stroke of paralysis, but it appeared very clearly, not only from the circum-

stances, but from the evidence of *Stone* himself, that both Kane and *Stone* supposed the instrument to be only a release of the lien of the mortgage upon the lots sold to Remington, and that by mistake the words acknowledging full payment and satisfaction of the mortgage were left in the instrument. After learning of this release, *Williams* refused to take the notes and mortgage from Kane's hands when they became due, claiming that the security was destroyed by the release, and that his liability as guarantor was thereby discharged. After the execution of this release, both *Stone* and *Williams* treated it as though it were only a partial release; *Stone* selling lots, and causing part of the money to be paid to Kane, and obtaining further releases of the lots so sold, and *Williams* purchasing one of the lots, and obtaining a release therefor from Kane, after knowing the contents of the alleged release in full. On behalf of the Zimmermans it appeared that they purchased a lot after the recording of the release, and in good faith relied upon the same as a complete release, and paid the purchase price, to wit, $525, to *Stone*, who paid no part of it to Kane. It further appeared that sixteen lots were left which had not been specifically released, and by *Williams'* own evidence it appeared that these sixteen lots are worth $500 each, or $8,000 in all.

The court made the usual foreclosure findings, and also found that the release of January 23, 1891, was only intended as a partial release of the lots sold to Remington, and that by mistake or inadvertence of the person who wrote the same the words indicating full payment and satisfaction were not erased from the printed blank, and that *Stone* and his wife knew that it was only so intended; that *Williams* knew that the mortgage had not been fully paid, and that both *Stone* and *Williams* thereafter dealt with Kane and obtained releases of specific lots, recognizing the continued existence of the lien of the mortgage; that the lots not specifically released were worth $8,000, and that *Williams*

had not been damaged by the making of the release; that the release should be reformed so as to show the true intent of the parties that it was only a release of the lots sold to Remington, and that the record thereof should also be reformed; that both *Stone* and *Williams* were liable for any deficiency arising on the sale, except that *Williams* should only be liable for such deficiency after deducting the $525 paid by Zimmerman to *Stone*.

Judgment was rendered in accordance with these findings. *Williams* filed exceptions to all the findings except the formal finding, and perfected his bill of exceptions, but *Stone* made no exceptions to the findings and perfected no bill of exceptions. The plaintiff, William H. Kane, died after judgment, and the action was revived in the name of *Christine E. Kane* as executrix. *Stone* and *Williams* appeal separately from the judgment.

For the appellants there was a brief by *H. K. Curtis*, attorney, and *N. S. Murphey*, of counsel, and oral argument by *Mr. Murphey*. They argued that the defendant *Williams*, as guarantor, was discharged by the release of the principal debtor. 2 Parsons, Notes & Bills, 134; *Cowper v. Smith*, 4 Mees. & W. 519; *Schroeppell v. Shaw*, 3 N. Y. 446; *Trotter v. Strong*, 63 Ill. 272; 9 Am. & Eng. Ency. of Law, 84. He is also discharged by a surrender or a negligent loss of the benefit of collateral security. 2 Parsons, Notes & Bills, 135; *Mayhew v. Crickett*, 2 Swanston, 185–191; *Bonta v. Curry*, 3 Bush (Ky.), 678; *Shippen's Adm'r v. Clapp*, 36 Pa. St. 89; *Sellers v. Jones*, 22 id. 423; *Kemmerer v. Wilson*, 31 id. 110; *Jennison v. Parker*, 7 Mich. 355; *Lamberton v. Windom*, 18 Minn. 506; *Sherraden v. Parker*, 24 Iowa, 28; *Lee v. Baldwin*, 10 Ga. 208; *Beach v. Bates*, 12 Vt. 68; *Burr v. Boyer*, 2 Neb. 265; *Capel v. Butler*, 2 Sim. & S. 457. By a release of the mortgage his right of subrogation to the security was totally destroyed. *Gardner v. Van Norstrand*, 13 Wis. 543; *Fond du Lac H. Co. v. Bowles*, 54 id. 430. As the com-

plaint contains no allegation that the satisfaction of mortgage was intended to be partial but was made full through accident, fraud, or mistake, and no relief was asked as to it, the court could not receive proof on those points. *Townsend Mfg. Co. v. Foster*, 51 Barb. 346, 352; 1 Greenl. Ev. §§ 51–52, 448–450; 1 Phillips, Ev. (3d ed.), 460.

O. T. Williams, for the respondent.

WINSLOW, J. The appeal of *Stone*, the mortgagor, possesses no merit. It is apparently based on the ground that no reformation of the alleged full discharge of the mortgage could be adjudged because no fraud or mistake in the execution of the paper was shown, and because the complaint contained no appropriate allegations upon which reformation could be granted. It is entirely certain that a serious mistake was inadvertently made by the scrivener, by which Kane executed what purports to be a full release of the mortgage when he only intended to release two lots. *Stone* knew the mortgage was not in fact paid, and knew that Kane's purpose was only to release the two lots sold to Remington. These facts so clearly appear from the evidence that they cannot be for a moment doubted. Such a case calls for reformation of the document in no uncertain tones. *Lardner v. Williams*, 98 Wis. 514. *Stone* preserved no exceptions to the findings, and perfected no bill of exceptions, and he states in his case that his appeal is based simply upon the record. In this position it is manifest that he cannot take advantage of defective pleading, if such there was. The judgment is sustained by the findings. There are no exceptions to the findings; so it must be conclusively presumed that they were based upon sufficient and competent evidence, and that the pleadings were properly amended, if that was necessary.

Nor is *Williams'* appeal much more meritorious. The release being reformed as to *Stone*, the mortgage has again

become a valid and effective lien as between the owner of the land and the holder of the mortgage. If it is a valid lien as between these parties, certainly no one else can claim that it is not such a lien, save innocent third persons who have dealt with the property in reliance upon the apparent discharge. *Williams* is not such a party, nor were there any such parties in the case save the Zimmermans, whose rights were protected by the judgment. *Williams'* contract was an absolute promise, for value, to pay the debt. It was not a promise upon condition, but as absolute in respect to payment as the promise of *Stone*. Upon such a guaranty the creditor owes to the guarantor "no duty except to act in the utmost good faith, and not be guilty of laches to his prejudice." *Hubbard v. Haley*, 96 Wis. 578. *Williams* has not been prejudiced in the least by the mistaken release. The mortgage is still a valid lien upon property worth, by his own admission, more than twice the amount of the judgment. The amount paid by the Zimmermans to *Stone* in reliance upon the discharge is deducted from his liability by the judgment, so that he is not prejudiced by that transaction.

The point was made by the respondent that the part of the judgment ordering a personal judgment for deficiency is a mere order, and is not appealable, but that the defendant should wait, and appeal directly from the judgment for deficiency when rendered. We do not regard the point well taken. As said in *Gaynor v. Blewett*, 86 Wis. 399: "The order is a necessary part of the judgment of foreclosure, and is a final adjudication of the defendant's liability for the debt." It is an integral part of the judgment, and fixes the rights of the parties, and hence may be appealed from.

By the Court.— Judgment affirmed on both appeals.

99 78
s40 LRA 651
40 LRA 653n
42 LRA 188n
43 LRA 693n
46 LRA 450n
51 LRA 252n

KASTEN, Respondent, vs. THE INTERSTATE CASUALTY COMPANY OF NEW YORK, Appellant.

March 3 — March 22, 1898.

Accident insurance: Construction of policy: Exception of poisoning.

Under a policy insuring a person against bodily injury sustained by external, violent, and accidental means, with a provision for payment to a beneficiary or beneficiaries in case of death from such injuries within ninety days therefrom, independently of all other causes, and with a condition that the liability of the assurer shall not extend to injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, *held*, that death caused by blood poisoning from the effects of the absorption into the system of septic poison evolved by the propagation of germs in cotton inserted by a dentist in wounds caused by the removal of teeth from the mouth of the deceased, to stop hemorrhage, is within the condition and creates no liability under the policy.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Action to recover on a $2,000 policy of accident and life insurance, which insured Fred A. Kasten against bodily injury sustained through external, violent, and accidental means, and provided that in case of death from such injuries within ninety days therefrom, independently of all other causes, the company should pay the sum of $2,000 to his wife, *Josephine M. Kasten*, if surviving, otherwise to his legal representatives, subject, however, to several conditions, among which was the following: "This insurance does not cover . . . injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." The cause of death was alleged to be the accidental injection of septic matter, into a wound caused by the extraction of two teeth, at the time they were extracted.

At the commencement of the trial there was a demurrer *ore tenus* to the complaint, made, overruled, and the ruling duly excepted to. The evidence tended to show that the deceased, while suffering from some serious derangement of his system, which manifested itself, among other ways, by severe toothache, had two of his teeth extracted by a dentist; that there was a diseased condition of the membrane surrounding some of the teeth, and a general foul condition of the mouth; that the teeth were extracted in the usual way, but it caused a rupture of the upper maxillary artery, or a branch of it, from which a violent hemorrhage ensued, and to stop that the dentist plugged the cavities with cotton; that thereafter blood poisoning ensued from the absorption into the system of some chemical poison supposed to have been caused by the propagation of disease germs in the cotton, the seat of the affection being where the teeth were extracted. The blood poisoning progressed to a fatal determination.

At the close of the evidence both sides moved for the direction of a verdict. Defendant's motion was denied and plaintiff's granted. Judgment was entered accordingly and defendant appealed.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas.*

For the respondent there was a brief by *La Boule & Hunt*, and oral argument by *F. S. Hunt.* They argued, *inter alia*, that the unexpected and unusual rupture of an artery in the pulling of the teeth was an accident, within the meaning of the policy, and so also was the introduction of cotton containing matter which caused blood poisoning, and those accidents were the proximate causes of the death. The poisoning was one of the effects of those accidents and was a secondary cause. The policy should be construed liberally in favor of the insured. May, Ins. (3d ed.), § 175. The word "poison" in the policy refers to substances commonly known as poisons and not to any of the phenomena of septicæmia. The

exception of death by poison means poison consciously and by an act of volition drawn into the system. *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632; *Pickett v. Pac. Mut. L. Ins. Co.* 144 Pa. St. 79, 27 Am. St. Rep. 618. The word "disease" is used in the policy in a restricted sense. If it was not broad enough to cover bodily affections, such as are expressly mentioned, it would not cover "blood poisoning." Even if it was a disease, it was caused by the injury, and that injury was the proximate cause of the death. *U. S. Mut. Acc. Asso. v. Barry*, 131 U. S. 100; *Bailey v. Interstate Casualty Co.* 8 App. Div. (N. Y.), 127; *Freeman v. Mercantile Mut. Acc. Asso.* 156 Mass. 351; *McCarthy v. Traveler's Ins. Co.* 8 Biss. 362.

MARSHALL, J. The evidence goes no further than the complaint. It may be said to establish the fact of death as alleged, that is, that it was produced by the accidental planting of septic matter in the mouth of the deceased at or about the time his teeth were extracted. While the inference from the allegations of the complaint is that the introduction of the foreign substance, which subsequently caused death, into the person of the deceased, was accidental, it was nevertheless by an act to which he consented. So the rulings on the demurrer to the complaint and the motions for the direction of a verdict, all present the same question, which is, Admitting everything alleged, is plaintiff entitled to recover? Such being the case, the rulings will be considered together.

The theory upon which the complaint was sustained and the verdict directed in respondent's favor, and upon which her counsel seek to sustain such rulings, defeats them if the plain wording of the contract is to be given effect according to the obvious intention of the parties thereto. It is contended that the septic matter was accidentally introduced into the wound caused by the extraction of the teeth, by its being in the cotton with which the wound was plugged

to stop the hemorrhage; that it was absorbed from the cotton into the surrounding parts; that death was the result; and that because the poisonous substance was thus accidentally planted, the calls of the policy for an injury caused by external, violent, and accidental means were all satisfied. Whether that be so or not, and if so, whether it can be said from the evidence, as a matter of law, that death ensued from the injury independently of all other causes, so as to satisfy the terms of the policy in that regard, are not by any means free from difficulty, but they are questions unnecessary to decide, because, the injury having been admittedly caused by something accidentally taken, administered, or absorbed, and death caused in whole or in part from such circumstances, by the plain language of the policy, the verdict should have been directed in favor of the defendant instead of the plaintiff.

While the word "poison," as used in the policy, may be construed to mean liquids commonly known as poisons, it is followed by the words "or anything," which clearly indicates that the intent was to include under the entire term everything of a poisonous nature. While it is true that, where the meaning of words in an insurance contract is in doubt, courts are to lean to that reasonable construction most favorable to the assured, they can go no further without making contracts for the parties which they did not intend to make. If words are plain, courts must give effect to them accordingly, or contractual obligations will be subject to variations and violations to suit the exigencies of particular cases. Here, in order to sustain a recovery, the court is asked, after having successfully passed difficulties in the way of holding that the death of the assured was caused solely by external, violent, and accidental means, in the face of evidence that the septic poison was voluntarily, though accidentally, planted in the system of the deceased, to pass the barrier by which the defendant excepted from the con-

tract death caused in whole or in part by the administration or absorption, accidental or otherwise, of poison or any other substance. No precedent to which we have been referred by counsel, or which we have been able to discover, warrants a construction of the contract of insurance that will enable the court to do that. Numerous cases may be found to the effect that the clause excepting death caused by inhaling gas, accidentally or otherwise, only covers cases of voluntary conscious inhalation. Such are *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632; *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472; *Menneiley v. Employers' L. Ass. Corp.* 148 N. Y. 596, and *Pickett v. Pacific M. L. Ins. Co.* 144 Pa. St. 79; but they do not apply to this case. Here, there was not that absence of volition and consciousness that were the turning circumstances of those cases. The rule itself is by no means free from criticism, nor has it passed without criticism from respectable courts. *Richardson v. Travelers' Ins. Co.* 46 Fed. Rep. 843. Certainly no good reason can be given for extending it to cases of accidental taking or absorption of poisonous substances into the system through the voluntary use, for a remedial purpose, of some other substance.

In the instances cited the word "inhaled" and the word "take," in view of other language used in the contract, were easily construed to contemplate voluntary conscious action, not in the sense that the victim should know the precise nature of what he was taking or inhaling, or its effect on his system, but that the thing taken should be by his act or permission. Here the cotton was placed in the mouth of the deceased by his permission. True, the fact that it contained the germs which propagated and evolved the poison which was absorbed into the blood with fatal effects was unknown and accidental; but that was within the express terms of the exception under consideration. In *Early v. Standard L. & Acc. Ins. Co.* 71 N. W. Rep. 500, a very recent case, the su-

preme court of Michigan reached the same conclusion to which we have arrived; and to the same effect is *Westmoreland v. Preferred Acc. Ins. Co.* 75 Fed. Rep. 244, where chloroform was administered, from the effects of which, and some other causes, death ensued, and it was held that, as the chloroform would not alone have caused death, the accidental concurrence of some other unknown cause did not make a cause of action. Here the cotton alone would not have produced death. It was properly used, but on account of its containing the poisonous germs not known to exist in it, they were voluntarily, though accidentally, introduced into the system of the deceased, and the poison evolved by their propagation was thereby carried into the circulation, corrupting the blood and causing death. That is one of the very things most carefully guarded against by the words of the insurance contract.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

---

99 78
d111 1636

STITTGEN, Respondent, vs. RUNDLE, imp., Appellant.

March 3 — March 22, 1898.

Judicial notice: City ordinances: Appeal: Arrest without warrant.

1. Courts will not take judicial notice of the acts and ordinances of municipal corporations.
2. Ordinances of a municipal corporation which are not mentioned in the pleadings nor introduced in evidence will not be considered on appeal.
3. A police officer cannot lawfully arrest a person for a misdemeanor without a warrant, unless it was committed in his presence, even though there may be a city ordinance giving him authority to do so.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

This action was brought against Patrick J. Gleason and *E. K. Rundle* to recover damages for an alleged false imprisonment. The arrest is said to have been without cause and without process of law. The defendants answered, alleging that Gleason was a police officer of the city of Milwaukee; that plaintiff committed a breach of the peace, and that *Rundle* and one Wolfert informed Gleason of the fact, and thereupon he arrested plaintiff. Henry Wolfert was named as defendant, but was not served. At the close of the testimony the court charged the jury that plaintiff's arrest was without process, and that, the offense for which he was arrested being a misdemeanor not committed in view of the officer, the only question for them to determine was whether *Rundle* directed or caused plaintiff's arrest, and the amount of damages sustained. The jury brought in a verdict for plaintiff for $400 damages against both defendants. A motion for a new trial was denied, and judgment was entered on the verdict, from which the defendant *Rundle* appeals.

Henry L. Buxton, for the appellant.

For the respondent the cause was submitted on the brief of *J. E. Wildish.*

BARDEEN, J. Some twenty different exceptions were taken to the charge of the court at the trial, but the only ones relied on by appellant are printed in his brief as follows: "A constable or police officer is a conservator of the peace, and has the right to arrest persons for a breach of the peace committed in his view, but he has no right to arrest one who has committed a breach of the peace concerning which he (the officer) has merely the information of third persons, and which was not committed in his view." "So, in this case, I instruct you that the evidence is uncontradicted that the arrest of the plaintiff in this action by the officer was without due process. I instruct you, therefore, that the

plaintiff is entitled to recover damages against the defendant Officer Gleason, because there is no pretense that he arrested this plaintiff for an offense, breach of the peace, or disorderly conduct committed within view of the officer who made the arrest." This is supposed to be bad law, because it is said to be contrary to an ordinance of the city of Milwaukee regulating the conduct of and granting authority to policemen of that city in cases of misdemeanors. The ordinance was not mentioned in the pleadings or introduced in evidence, and first makes its appearance in the case when printed in appellant's brief. The obligations of courts are sufficiently burdensome when they are required to take cognizance of all acts creating and granting powers to municipal corporations. They have uniformly refused to take notice of the acts and ordinance of such bodies except upon due proof. Jones, Ev. § 117; *Pettit v. May*, 34 Wis. 666, 674; *Cox v. St. Louis*, 11 Mo. 431. And the introduction of such an ordinance in evidence when not pleaded, against proper objection, is error. *Horn v. C. & N. W. R. Co.* 38 Wis. 463.

There is no pretense or claim that respondent, at the time of his arrest, was doing any act that would justify his being taken into custody. The act complained of had been committed some twenty or thirty minutes previous to the arrest, and not in the presence of the officer who made the arrest. An arrest without warrant has never been lawful except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in the presence of the officer. 2 Am. & Eng. Ency. of Law (2d ed.), 869; *In re Way*, 41 Mich. 299, 304. The charge of the court seems clearly within the lines above indicated.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

ELLIS, Appellant, vs. LAMPMAN, Respondent.

March 4 — March 22, 1898.

Appeal: Irregularity of undertaking: Waiver.

1. The consent of the respondent that an undertaking on appeal, which is found to be insufficient, may be signed by a new surety, and when so signed shall be deemed satisfactory, is a waiver of the irregularity and precludes the respondent from taking advantage thereof.
2. An appeal from a judgment in an action of ejectment dismissing the complaint for failure of the plaintiff to pay the costs of a continuance, which were less than $100, cannot be sustained, under ch. 183, Laws of 1897, as one in which the title to lands is in question. It involves no consideration of the merits of the case, and the court may determine that question on a motion to dismiss.

APPEAL from a judgment of the circuit court for Barron county: A. J. VINJE, Circuit Judge. The respondent moved to dismiss the appeal. *Motion granted.*

This action was commenced in the municipal court of Barron county to recover for a trespass to land alleged to have been committed by the defendant, the damage being laid at the sum of $10. An answer was interposed alleging that the title of land would come in question, and the action was duly removed to the circuit court. When the action was called for trial in that court plaintiff made a motion to make one *Allen* a party defendant. The motion was granted, the cause was continued, and plaintiff was required to pay the sum of $46.82, costs of continuance, within thirty days, and, on default thereof, said action was to be dismissed. Subsequently the time of payment was extended to sixty days. Proof having been made of the failure of plaintiff to pay such costs, a judgment was duly entered, dismissing the action, from which this appeal was taken. Defendant excepted to the sufficiency of the sureties on the undertaking, and, on the day appointed for them to justify, it was found

that one of them was insufficient. Thereupon, and by consent of defendant's counsel, another surety signed the original undertaking. Defendant now moves this court to dismiss said appeal on the grounds that no sufficient undertaking has been given, and that the amount in controversy is less than $100.

James Wickham, for the motion.

C. F. Lamb, contra.

PER CURIAM. The undertaking must be deemed sufficient. The consent of defendant's counsel that the new surety might sign the original undertaking, and the statement that when so signed it would be deemed satisfactory, precludes the defendant from taking advantage of the irregularity.

The merits of the case are not involved on this appeal. An inspection of the record discloses the fact that the only question that could be considered by this court is whether the circuit court was justified in dismissing the action for failure of plaintiff to pay the costs of continuance. The amount in controversy in this action is but $10, and the judgment for costs from which this appeal is taken is but $46.82. This appeal cannot be sustained unless the judgment is one in which it can be said that the title to lands "shall therein be in question," under ch. 183, Laws of 1897. Clearly, this is not such a case. It involves no consideration of the merits of the case. The obvious purpose of the statute is to relieve this court from the obligation of examining and determining controversies where the amount involved, exclusive of costs, is under $100, unless in the *judgment itself* the title to lands shall be in question. Where it is manifest that the judgment appealed from involves no such question, this court feels at liberty to determine that question on a motion to dismiss.

The record in this case shows the grossest violation of rule VII½ of this court. Papers are jumbled together in

the utmost confusion, without regard to date or their relation to each other. We find ample justification for the dismissal of this appeal on these grounds, even if the other ground were deemed insufficient.

Appeal dismissed.

ZEHREN, Respondent, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.
ROBRAN, Respondent, vs. SAME, Appellant.

March 4—March 22, 1898.

Electric street railways: Country highways: Additional burden: Changing grade.

1. An electric railway for the carriage of passengers between cities, which is constructed and operated upon a country highway, is an additional burden upon such highway, and its proprietors cannot, even with the permission of the town authorities granted for the sole purpose of enabling them to do so, cut down the highway so as to seriously impair the rights of an abutting owner to access to his lot, without his consent or the payment of compensation to him.

[2. Whether the power of town boards to change the grade of highways extends beyond such changes as may be necessary to make them safe for travel, to the prejudice of abutting owners, questioned but not decided.]

APPEALS from orders of the superior court of Milwaukee county: GEO. E. SUTHERLAND, Judge. *Affirmed.*

These are two actions in equity brought to permanently enjoin the defendant railway company from grading down the highway in front of the residences of the plaintiffs, and from laying an electric street railway thereon. The cases are identical in their facts, and but one statement will be necessary. The facts appearing by the complaint and the affidavits used upon the motion to dissolve the preliminary injunction were substantially as follows:

Oakland avenue is a highway sixty feet in width, running north and south in the city of Milwaukee, and extends northward into the town of Milwaukee, and reaches the village of White Fish Bay, which is an incorporated village of four or five hundred inhabitants, whose southern boundary is about one and one-half miles north from the northern boundary of the city of Milwaukee. The plaintiffs own, respectively, two small lots on which they reside, fronting on the east side of this highway, about one quarter of a mile north of the city limits of Milwaukee. This highway has existed and been traveled by ordinary travel for many years, during all of which time there has been a grade in front of the plaintiffs' lots, ascending to the north about one foot in twenty-one, and the plaintiffs' lots are now four or five feet above the grade. This grade extends for a distance of 800 feet along the highway, and for an additional 300 feet there is a grade of one foot in thirty feet. Most of the property on the highway from the city limits north past the plaintiffs' lots has been platted into city lots, and many of the lots have been sold; but the greater part of them are held by nonresident owners for sale, and are not occupied or improved. There are about twenty-five actual residents upon the road from the limits of the city to the limits of White Fish Bay. The village of White Fish Bay is composed largely of people doing business in Milwaukee.

The defendant owns and operates substantially the entire electric street railway system of the city of Milwaukee, and carries passengers only. In the summer of 1897 many of the inhabitants of White Fish Bay desired an extension of the defendant's electric street railway on Oakland avenue to the village of White Fish Bay; and the defendant was desirous of making that extension, but it declined to build the line unless the steep grade above mentioned was considerably reduced; and, after negotiations with the town board of the town of Milwaukee, a written agreement was made

between the defendant and the town board, August 17, 1897, by which the defendant was allowed to build its electric road for passenger service upon Oakland avenue, past the plaintiffs' premises, and to operate it under certain conditions for fifty years, provided that it would grade the highway at its own expense, and save the town harmless from all damages by reason of the change of grade, such new grade being made according to a profile attached to the agreement. By this agreement and profile the highway was to be cut down in front of plaintiffs' lots, and for a long distance on either side of them, and was to be filled in at other places so as to reduce the grade. The depth of the cut in front of the plaintiffs' premises was about eight feet, and the width of the cut at the bottom thirty-six feet, with the sides sloping back on each side to the street line. Afterwards, on October 16th following, the town board made an order fixing the grade of the street as indicated in the profile. A large proportion of the property owners on the highway along the line of the proposed change consented, in writing, to the change; but others, including the plaintiffs, did not consent. By the change proposed, the lots of the plaintiffs were to be left from twelve to fourteen feet above the roadbed, and access to them by team will be either entirely cut off or made very difficult.

A temporary restraining order was obtained upon the complaint and accompanying affidavits in each case at the commencement of the actions. Afterwards the defendant appeared, and, upon affidavits, moved in each case to vacate the order, which motions were denied, and the defendant appeals in both cases.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. P. Miller*. They argued, *inter alia*, that a lot owner was not entitled to damages for a change of grade of a highway in front of his premises. *Colclough v. Milwaukee*, 92 Wis. 186; *Harrison*

v. Milwaukee Co. 51 id. 645. The town board of supervisors had the right to change the grade of the highway in question in this case, and to do the work either by itself or by the railway company, and the latter, in doing it under the authority of the board, was not liable to the abutting owners. Booth, St. Ry. Law, 133–139. The town board had a right under sec. 3, ch. 313, Laws of 1860, and secs. 1862, 1863, R. S. 1878, to grant the franchise to the defendant company. The avenue upon which this railway is to be operated is not an ordinary country road, but a highway leading into a populous suburb. *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 561–572. An electric street railway upon a country road is not an additional burden, and the abutting owner is not entitled to compensation therefor if it does not impair his right of access to his property. When land is taken for a highway the owner is entitled to receive the full value thereof. *Norton v. Peck*, 3 Wis. 714; S. & B. Ann. Stats. sec. 1848. Full value having been paid for the land used for a highway, the legislature may authorize, without further compensation, the construction of a street railroad upon it, so long as that does not interfere with its use as a street. *Hobart v. Milwaukee City R. Co.* 27 Wis. 194. Our statutes relating to highways are, with slight modifications, derived from those of Massachusetts, and the decisions of the courts of that state are valuable in determining the uses to which a street may be put without additional compensation. *Pierce v. Drew*, 136 Mass. 80; *Chase v. Sutton Mfg. Co.* 4 Cush. 152, 167; *Boston v. Richardson*, 13 Allen, 146, 160; *Comm. v. Temple*, 14 Gray, 69, 77; *Comm. v. Lowell G. L. Co.* 12 Allen, 75; *Att'y Gen. v. Metropolitan R. Co.* 125 Mass. 515, 517; *Lincoln v. Comm.* 164 id. 9. Many other states have adopted the same doctrines. Booth, St. Ry. Law, §§ 82, 83; *Hewett v. W. W. T. Co.* 4 Mackey, 424; *Irwin v. G. S. Tel. Co.* 37 La. Ann. 63; *Cater v. N. W. Tel. Exch. Co.* 60 Minn. 539; *Peo-*

ple v. Eaton, 100 Mich. 208; *Julia Building Asso. v. Bell Tel. Co.* 88 Mo. 258; *Gay v. M. U. Tel. Co.* 12 Mo. App. 485; *Hirshfield v. Rocky Mt. Bell Tel. Co.* 12 Mont. 102; Mills, Eminent Domain, § 187. An electric street railroad outside of city limits but in a suburb is not an additional burden. *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 567.

For the respondents there was a brief by *O'Connor, Hammel & Schmitz*, and oral argument by *A. J. Schmitz* and *Leopold Hammel.*

WINSLOW, J. The defendant proposes to construct and operate an electric street railway for the carriage of passengers upon a highway in a country town outside of the city limits of Milwaukee, and, for that purpose and by permission of the town authorities, to cut down the highway about eight feet, so that an abutting owner's right of access to his property will be seriously impaired; and the question is whether this can be done without the consent of the abutting owner, and without the payment of compensation to such owner.

The question is a new one in this court, and one the importance of which, in view of the rapid development of electric power as a means of carriage for long distances, can hardly be overestimated. If the highway in question in this case can be so used, the question at once arises whether every country highway may not be used in the same way. If it be said that the highway before us in this case is in effect a city street because of its close proximity to the city, and because the adjoining lands are platted, and because it connects a suburban village with the city, and that a clear distinction ought to be drawn between such a highway and the ordinary country road in farming districts, the inquiry will then be, Can such a distinction be practically drawn, and can it be satisfactorily applied, and upon what solid

grounds will it rest? A distinction so important must in reason be one which can be drawn with some reasonable degree of certainty in every case, and must be capable of practical application. Is the line to be drawn according to density of population, and, if so, what degree of density is to be the test? Is it to depend upon the activity and hopefulness of adjoining landowners in platting their land into building lots, or upon the question whether a neighboring village or town can properly be called a suburb of the principal city? Or is it to depend upon a judicious consideration of all these conditions massed together, and upon a conclusion to be evolved from the entire mass, which will determine the answer to the question in each particular case, but in no other? Or, on the other hand, must it be held that, in order to make a highway a city street, it must lie within the corporate boundaries of the city, and that outside of those boundaries no reasonable or practicable distinction can be drawn based either on proximity to the city, or on platting of lands or density of population, or upon the fact that the highway connects the city with a neighboring suburban village? These are all important questions, which, as before indicated, are new in this court, and demand careful consideration.

It was long ago held by this court, following the well-nigh universal current of authority, that a horse railway constructed upon grade in a city street, and by permission of the city authorities, was not an additional burden upon the fee, and that the adjoining landowner was not entitled to compensation therefor. *Hobart v. Milwaukee City R. Co.* 27 Wis. 194. In a recent case it was further held by this court that an electric railway constructed under a charter authorizing it to carry passengers, merchandise, baggage, mail, and express matter, and running from city to city, was not a street railway, within the meaning of the *Hobart Case*, so far as it passed over the highways of intervening country

towns, and that it could not use such highways without the consent of, or compensation paid to, the owners of the abutting real estate. *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 561. No other decisions directly bearing on the controversy before us now have been made in this court, and it is manifest that neither of the cases referred to is decisive of the questions here involved.

In other courts there have been decisions holding more or less directly that an electric street railway upon a city street constructed with poles and a trolley wire stands in the same legal situation as a horse railway, and does not constitute necessarily an additional burden to the fee. These cases will be found cited in the note to § 83 of Booth on Street Railway Law, although it is entirely clear that the cases cited do not all support the broad proposition which the writer lays down. Most of these cases were reviewed by RAGAN, C., in *Jaynes v. Omaha St. R. Co.* (Neb.), 74 N. W. Rep. 67, and it is not deemed necessary to review them in this opinion, as the question is not before us. The Nebraska case cited seems to reach the conclusion that if an electric street railway on a city street moves its cars without occupying permanently any part of the street with poles or wires, as, for instance, by storage batteries, it does not constitute an additional burden simply because the motive power is electricity; but that the planting of poles in the street, so as to interfere with an abutting owner's right of access to his property, will constitute an additional burden, for which compensation must be made. We have been referred to no case which squarely holds that the mere fact that the cars upon a street railway in a city street are propelled by electricity by the overhead trolley system, instead of by animal power, makes the railway, as a matter of law, an additional burden, although very vigorous dissenting opinions to that effect may be found in the case of *Detroit City R. Co. v. Mills*, 85 Mich. 634.

The question has not been presented to this court, and hence has not been decided, and cannot be decided now. The question here presented is whether such a railway is an additional burden when it is to be operated upon a highway in a country town, and when, also, the railway company proposes to grade down the highway, for the purpose of laying its track, to such an extent as to seriously impair the right of access of adjoining lot owners. It is very evident that this last-named consideration is an important one.

Conceding for the moment that the highway should be treated as a city street, and that an electric trolley system operated upon grade upon such a street is not an additional burden upon the fee, still it has not been yet held by this court that the public authorities could lawfully authorize a street railway company to grade down a street for the express purpose of laying its tracks and operating its road to the impairment of the abutting owners' right of access. It was said in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, that a horse railway upon a city street was not an additional burden "except when some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby;" and this is certainly in accord with the authorities. Now, it appears very conclusively here that the proposed grading of the highway is about to be done by the defendant company, by consent of the town authorities, for the express purpose of enabling the company to successfully build and operate its street railway. One of the officials of the company, whose affidavit was used upon the hearing of the motion, deposed that the defendant's cars could not be practically or economically operated over the highway if the grade were not changed, and that the company had always refused to extend its line on that account, and that, before it consented to extend the line, it insisted that the new grade be established. It was evidently solely in consequence of this demand by the street railway com-

pany that the town authorities made the agreement with the company, binding it to do the grading at its own expense, and to hold the town harmless from all claims for damages resulting therefrom. There does not seem to have been any other demand that the grade be changed. The highway had been in use for many years, and had sufficed for all ordinary purposes of travel; and it is evident that the change was to be made simply to meet the requirements of the street railway service, and in pursuance of the demand of the company. It is, of course, true that the bed of the highway, when graded, would have a somewhat easier grade for the uses of ordinary travel, but that seems to have been merely an incidental result. The object aimed at was to fit the highway for the corporate uses of the street railway company, and hence it was very reasonably insisted by the town authorities that the railway company, being the beneficiary, should defray the expense. This being so, the question is whether in fact the railway company is not about to materially impair the right of access of the adjoining lot owners by the construction of its railroad, within the meaning of the decision in the *Hobart Case*, and whether it can do so without compensation.

It is said on behalf of the company that the town board has full power to change the grade of the highway at pleasure, and without payment of compensation to lot owners, and that the company is simply acting as the agent or employee of the town board in doing the grading, and hence that such grading cannot be considered as any part of the construction of the railroad, but rather the exercise of the power of the town to grade highways.

It has been held in this state that cities and other municipal corporations which are endowed with power to fix and change the grades of streets are not liable to adjoining lot owners for such changes, in the absence of express statutory provision for compensation. This principle is so well

established that it is unnecessary to cite authorities in its support. The assumption that town boards have the same broad powers as to the grading of highways as are generally conferred upon the authorities of cities is somewhat doubtful, to say the least, if not unwarranted by the provisions of the statutes. It is true that town boards have the care and supervision of the highways and bridges of the town, and it is their duty to see that they are kept in repair, and that obstructions are removed. They are also required to divide the town into road districts, and levy highway taxes, and to require the overseers of highways to perform their duties, and they have power to lay out new highways. R. S. 1878, sec. 1223, as amended by ch. 103, Laws of 1885. These comprise the general duties of the town boards as to highways, and we are not referred to any section empowering the board to make any such radical change of grade as was attempted here, in the absence of some showing that such grading was necessary in order to make the highway safe for travel. Doubtless, the board may make such changes in the surface of the road as will make it safe for travel, because they are charged with the duty of providing reasonably safe highways, and they must, of course, possess powers broad enough to carry out this very important duty; but, when it cannot be shown that a change is necessary to accomplish this purpose, the question as to their power to make a change prejudicial to the adjoining property owners seems doubtful. We do not, however, decide this question, because we do not deem it necessary. Grant, if you please, that the power exists; still it is entirely certain that it is a power to be exercised solely for the public good, and not for the benefit of a private corporation or individual. Upon this subject the following very pertinent remarks are made in Elliott, Roads & Streets, 558, note 4: "The rule that municipal corporations may change the grades of streets at pleasure is, at best, not easily defended, and to so extend it as to make

it work for the benefit of a private corporation at the expense of a property owner, is giving a harsh rule an application that it should never receive. . . . We do not believe that the discretionary power to change grades of streets exists where the change is solely for the benefit of a private corporation or individual. We cannot avoid the conviction that the courts may inquire whether the change is for municipal purposes or exclusively for the benefit of a private corporation, and if they find that it is solely for the benefit of such a corporation, they may rightfully interfere."

These views seem to us reasonable and just. In the present case it is certain that the attempted change of grade was made at the demand of, and primarily for the sole benefit of, the street railway company. No fact could be more clearly proven than this fact is in the case. Whatever small benefits the general public may receive in the way of an easier grade for vehicles or the privilege of riding upon the electric cars are merely incidental to the main object. That main object was and is the pecuniary benefit to the street railway company arising from the operation of street cars over the highway, which was impracticable before the change, and will be practicable after the change. The town authorities had no intention of grading the street, and the public did not demand it. We believe public powers which are held in trust to be exercised for the benefit of the whole people ought not to be, and cannot be, farmed out to an individual for his own especial benefit, when private rights are thereby invaded. Such proceedings seem to us clearly against public policy. The vice lies not in the fact that the work is physically done by the street railway company instead of by employees of the town. The town may probably choose its own agents, to whom it may intrust the performance of lawful *public* works. But the vice lies in the fact that the work itself is primarily and essentially private work, done by a private corporation, for the ad-

vancement solely for its own ends, and is not a work demanded by the public, or which would be undertaken by the town as a necessary public work.

The question is certainly not free from difficulty. It is stated in Booth, St. Ry. Law, § 92, that if a street railway company, acting under authority of the city council in laying its tracks, changes the grade of a street to conform to a new grade established by the municipality, and does the work properly and skilfully, as directed by the city authorities, it will not be liable to an abutting owner for incidental damages. The cases cited in support of the doctrine seem to be cases where the city, acting in exercise of its undoubted powers, has fixed the grade of the street for the benefit of the whole public, and thereafter the railway company has built its road, and done the necessary grading to put its tracks upon the legal grade. *Briggs v. Lewiston & A. H. R. Co.* 79 Me. 363; *Inter-State C. R. T. R. Co. v. Early*, 46 Kan. 197. Such cases are manifestly not this case. It is very certain that a street railway cannot change the grade of a street to suit itself, and thereby injure the property owner's right of access to his property. Booth, St. Ry. Law, § 91; *Nichols v. Ann Arbor & Y. St. R. Co.* 87 Mich. 361. Regarding the change of grade here to be made as substantially a change made by the railroad company for its own ends, and purely to enable it to operate its road successfully, we are unwilling to subscribe to the doctrine that the mere consent of the town authorities will free the railway company from liability to the adjoining property owner whose property will be rendered practically inaccessible. We regard it as clear that the abutters' right of access has been cut off by the building of the road and the necessary acts connected therewith, and not by the merely nominal act of the town board in attempting to fix the grade at the request and for the sole benefit of the street railway company.

There is, however, another question in the present case, which is much broader in its scope, and which is becoming a more pressing question every day; and that is the question whether passenger railroads operated by mechanical power can be laid over country highways without consent of, or compensation paid to, the adjoining landowner; or, in other words, Are they additional burdens to the fee? The development of electric railways and motors is so rapid that this question should, if possible, be settled, as the day is evidently not far distant when such passenger railways running from city to city will be numerous, and extend to all parts of the state. It is well settled that a horse railroad upon a city street, built upon grade, and for the carriage of passengers only, is not an additional burden. The drift and weight of authority in other states seem to be also that the operation of the road by electricity or other mechanical power does not change the nature of the road in this respect, although it is also held by some other courts that, if permanent erections in the street interfering with the right of access are necessary for the operation of the road, these may constitute an additional burden. This court, however, has not passed upon these questions; and, however they may be decided, the result would not necessarily determine the status of a country road in these respects.

That there are many and marked differences between the uses to which a city street is put and the uses to which a country highway is put cannot be denied; nor can it be denied that the uses contemplated when the land is taken vary widely, except that both are intended for purposes of travel. The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly, a city convenience, for use in

the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of the street railways remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street, and rather as a help to the street than as a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered, and it is found that by its use an enlarged city street-car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation, covering long distances and connecting widely separated cities and villages, by using the country highways, and operating long and heavy coaches, sometimes made up into trains of several cars. Thus, the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city

to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus, the operation of this newly-developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many.

However we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere street railway, which was held in the *Hobart Case* not to be an additional burden on the fee. The reasons given for that holding in that case either do not apply at all, or only in a very limited degree, to the interurban railway. The difference is not so much in the change of motive power as in the entirely different character of the use. Suppose a steam railway corporation were organized to carry passengers only from city to city, and should attempt to lay its track upon the country roads without compensation; is there any doubt but that it would be held that it could not do so? We think not. Our conclusion is that an interurban electric railway, running upon the highways through country towns, is an additional burden upon the highway. *Pennsylvania R. Co. v. Montgomery Co. Pass. R. Co.* 167 Pa. St. 62.

But it is said that a distinction should be drawn between a highway in close proximity to a city, or running between the city and a neighboring suburb, and the ordinary country road through a farming district. The suggestion is not without weight. There is much difference between the practical uses to which the two highways are generally put. The suburban highway very frequently approximates closely

to the city street. But, as indicated at the outset of this opinion, the difficulty in drawing any clear line of demarkation between the two is very great. If a line be drawn in one case upon the facts in that case, depending upon mere proximity, or upon the manner of use, or the density of population, or the prospect of rapid settlement, or upon all of these circumstances together, it cannot apply to any other case; and the question will always be one of doubt and embarrassment, leading to different conclusions in different courts. Such a condition of the law is to the last degree undesirable. The legislature, by ch. 175, Laws of 1897, has provided that such corporations may condemn lands necessary for their use, but has further provided that the act should not apply to streets in an incorporated city. In thus clothing street railway companies with the power to condemn as to all property except streets within city limits, the legislature seems to have indicated its conclusion that the city line was the proper line of demarkation, and that within that line, at least, condemnation of a street was unnecessary. While this legislative idea has no binding force in determining the question of additional burden, it may justly be considered by the court which is called upon to pass upon a question beset with so much difficulty. If the line be fixed at the limits of the corporation, it will at least have the great merit of certainty, and be capable of unerring application. Presumably the city limits include the entire urban area, and we feel, under all the circumstances, that it is the true and proper line.

We are not unmindful of the fact that the questions discussed in this opinion are vexed questions, upon which there has been much contrariety of opinion in the various courts of the country, and that the law is only in process of settlement, and must continue in that condition for years. In endeavoring to draw the line between the public right of passage, upon the one side, and the rights of the private

owner, on the other, great care is manifestly needful that neither be sacrificed nor unduly magnified at the expense of the other.

We held in the case of *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 561, that an electric railway for the carriage of passengers, freight, and express matter between cities constitutes an additional burden upon the highway in a country town through which it passes. We hold in this case that an electric passenger railroad upon a country highway falls under the same rule. Both holdings seem to us to be founded upon good reason as well as authority, and we believe them to be salutary and just.

By the Court.—Orders affirmed.

FRED MILLER BREWING COMPANY, Respondent, vs. MANASSE, imp., Appellant. 99 99 / 107 118

March 5—March 22, 1898.

Assignment of mortgage by indorsement of note: Notice by record.

The indorsement of a note secured by a mortgage, and delivery of such note and mortgage by the owner to another for the purpose of conveying the same to such other, but without any written assignment or notation of the fact of record, passes to such other the mortgage as an incident of the debt, and his possession thereof constitutes constructive notice of his interests therein, binding on any person who deals with the former owner in regard to the property, so that such person cannot claim a *bona fide* interest in the securities, hostile to the first transferee, by reason of the fact of there being no notice of such first transfer of record.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Milwaukee county: GEO. E. SUTHERLAND, Judge. *Affirmed.*

Action to foreclose a mortgage. The complaint was in the usual form. The defendant *Manasse* was made a defend-

ant as a person interested, subject to the rights of the plaintiff. She answered, among other things, by way of a counterclaim, stating facts claimed to show she was the rightful owner of the note and mortgage and praying for the establishment of her title. Plaintiff duly replied to such counterclaim. During the progress of the trial said defendant asked leave to withdraw her counterclaim, which request was taken under advisement, and not thereafter directly decided. No exception was taken to the action of the court in that regard. The result of the trial was that the court filed findings as follows:

(1) December 21, 1894, Minna Rossmann, for value, made and delivered to Lorenz Thelen her promissory note, promising to pay Thelen, on or before five years after the date thereof, $500 with interest at five per cent. per annum.

(2) To secure the payment of the note Rossmann gave Thelen a real-estate mortgage which was duly recorded.

(3) July 3, 1895, Thelen indorsed the note in blank and delivered the same, with the mortgage, to plaintiff, to hold the same as collateral security for the payment of $375, owing to the former from the latter on a demand note.

(4) The debt from Thelen to plaintiff has not been paid, and the note and mortgage is the one in suit.

(5) Prior to the filing of the notice of the pendency of this action, March 22, 1897, there was nothing in the register's office showing plaintiff's claim under the note and mortgage.

(6) November 5, 1896, Thelen duly assigned the mortgage to Hulda Miller, and January 18, 1897, she duly assigned the same in writing to *Lottie Manasse.* Both of the assignments were duly recorded. At the time of such assignments the note and mortgage were in the possession of plaintiff, but neither *Lottie Manasse* nor Hulda Miller had actual notice thereof, though they had constructive notice of plaintiff's rights therein.

(7) Plaintiff had no notice, actual or constructive, of the

aforesaid assignments to Miller and *Manasse*, till about February 17, 1897, when this action was commenced.

(8) The allegations of the complaint, except that as to a part of the indebtedness on the note being due, are true.

As conclusions of law the court held, in effect, that the complaint, so far as it asks for foreclosure of the mortgage, should be dismissed, but that the cause should be retained for the purpose of settling the issue as to the ownership of the securities, raised by the counterclaim and reply thereto; that the rights of defendant *Manasse* are subject to those of the plaintiff, who is a *bona fide* holder of the note and mortgage as security for the debt due it from defendant Thelen. Judgment was ordered accordingly, establishing plaintiff's title to the note and mortgage, as above indicated, and that it recover costs of the defendant *Manasse* incurred by reason of her counterclaim. Judgment was entered accordingly.

Charles L. Aarons, for the appellant, contended, *inter alia*, that an assignment of a mortgage is a "conveyance" of the mortgaged real estate, within the meaning of the recording act (sec. 2241, R. S. 1878), and the plaintiff's assignment, never having been recorded, was void as against the defendant, whose title was duly recorded. *Butler v. Bank of Mazeppa*, 94 Wis. 351; *Kellogg v. Smith*, 26 N. Y. 18; *Purdy v. Huntington*, 42 id. 348; *Vanderkemp v. Shelton*, 11 Paige, 28; *Livermore v. Maxwell*, 87 Iowa, 714; *Cutler v. James*, 64 Wis. 178. In this case, the indorsed note and the mortgage together constitute a conveyance of real estate which, under the statute, should have been recorded in order to be valid as against the defendant, who is a subsequent purchaser in good faith. If the recording act does not apply to such a case, its whole purpose is defeated. *Greene v. Warnick*, 64 N. Y. 227; *Bacon v. Schoonhoven*, 87 id. 446, 450; *First Nat. Bank v. Chafee*, 98 Wis. 42; *Moore v. Thomas*, 1 Oreg. 205; *Jackson v. Post*, 15 Wend. 588, 594; *Johnson v. Carpenter*, 7 Minn. 176; *Lewis v. Kirk*, 28 Kan. 505; *Bank*

of Indiana v. Anderson, 14 Iowa, 544; 15 Am. & Eng. Ency. of Law, 846.

For the respondent there was a brief by *Nath. Pereles & Sons*, and oral argument by *C. F. Hunter*.

MARSHALL, J. The findings of fact are amply sustained by the evidence. The only question of law that need be decided is, Does a person become the *bona fide* holder of a note and mortgage by purchasing them for value, of another who has title thereto of record, while the same are in possession of a third person who received them as security from such other, and took title thereto for such purpose, by an assignment of the note in blank, and a delivery thereof, together with the mortgage, so as to cut off the rights of such third person? That must be answered in favor of the respondent in accordance with the decision of the trial court. A mortgage is not property at all independent of the debt it secures. The extinguishment of the debt *ipso facto et eo instanti* extinguishes the mortgage. The mere entry on the record of a release of the mortgage is not for the purpose of extinguishing it, but as evidence of a previous discharge of the debt. *Martineau v. McCollum*, 3 Pin. 455; *Croft v. Bunster*, 9 Wis. 503; *Kelley v. Whitney*, 45 Wis. 110. In the latter case, Mr. Justice COLE said, in effect, that it is the settled law of this state that the transfer of a note before maturity, secured by a mortgage, vests in the transferee the note, discharged of all equities of the former holder, and carries with it, as an incident thereto, the mortgage as well, discharged of equities in a like degree. It follows that the appellant took no greater title by her assignment of the mortgage than the interest which Thelen reserved when he transferred the securities to respondent. Its possession of the note and mortgage was notice to the appellant and to all other persons dealing with the securities, of its interests therein.

By the Court.—The judgment of the superior court is affirmed.

CROWNS, Respondent, vs. FOREST LAND COMPANY, Appellant.

99 103
s100 554
s110 548
99 103
f111 1 73

March 5 — March 22, 1898.

Foreclosure of mortgage: Notice of appeal: Adverse party, who is: Pleading same facts in abatement and in bar: Frivolous pleading.

1. The "adverse party," upon whom notice of appeal is to be served in a foreclosure case, is one who has an interest adverse to the reversal of the matter appealed from. The purchaser at the foreclosure sale, whose title has become absolute by confirmation of the sale, if a stranger to the record, has no such adverse interest and is not an "adverse party" within the meaning of sec. 3049, R. S. 1878.
2. Were such purchaser to be deemed an adverse party, the fact that the motion to dismiss the appeal because notice was not served on such purchaser was made by a party to the record on his own account and not on behalf of the purchaser, would be sufficient reason for denying the motion.
3. If a defendant pleads the same matter both in abatement and in bar of the action, the latter plea overrides the former.
4. An answer in a foreclosure action which alleges that, as between the nominal mortgagee, in whose name the action is brought, and the real party in interest, there was no consideration for the note and mortgage, presents no issuable facts, and may properly be stricken out as frivolous.
5. So, also, an answer alleging that the note and mortgage in suit were taken in the name of the plaintiff for the purpose of enabling the real owner to evade taxation on account thereof, presents no ground for a discharge of the mortgagor from his just debt.

APPEALS from judgments of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action to foreclose a mortgage. The answer sets up a plea in abatement to the effect that the action was not brought in the name of the real party in interest; that plaintiff had no interest in the mortgage; and that Otto D. Bjorkquist was the real party in interest. Substantially the same facts are set up by way of defense. There is also a further defense that the mortgage was given for land purchased by defendant from Otto D. Bjorkquist, and that the

same was taken in the name of plaintiff for the unlawful purpose of covering and concealing the same from the assessors to escape taxation. On motion the answer was stricken out as frivolous, and judgment was entered for plaintiff. Afterwards, and in due time, the property was sold to one Otto D. Bjorkquist, the sale confirmed, and a judgment for deficiency was entered against the defendant. The defendant appeals from both the judgment of foreclosure and the judgment for deficiency. Upon its appearance in this court, the respondent moved to dismiss both appeals on the ground that the notices of appeal and undertakings had not been served upon Otto D. Bjorkquist, the purchaser at the foreclosure sale. Both appeals and motions will be disposed of in one opinion.

For the appellant there was a brief by *Nath. Pereles & Sons*, and oral argument by *C. F. Hunter*. They argued, among other things, that the objection that the plaintiff is not the real party in interest was properly taken by plea in abatement. *Dutcher v. Dutcher*, 39 Wis. 651; *Plath v. Braunsdorff*, 40 id. 107–110; *Robbins v. Deverill*, 20 id. 142, 148; R. S. 1878, secs. 2605, 2607. In Nevada a mortgage taken in the name of a non-resident to evade taxation is held void. *Drexler v. Tyrrell*, 15 Nev. 114.

For the respondent there was a brief by *Turner, Bloodgood & Kemper*, and oral argument by *W. J. Turner*.

Bardeen, J. First, as to the motions to dismiss the appeals. It is true that a purchaser at a foreclosure sale becomes a *quasi* party to the suit, as was held in *Ward v. Clark*, 6 Wis. 509. It is also true that the purchaser at such sale was held to be an "adverse party," within sec. 3049, R. S. 1878, so as to require the service of a notice of an appeal from the order confirming the sale, as laid down in *Rogers v. Shove*, 98 Wis. 271. But after the sale has been confirmed the right of the purchaser, if a stranger to the rec-

ord, becomes absolute, and his title will not be disturbed upon a reversal of the judgment. *Jesup v. City Bank*, 15 Wis. 604; *Corwith v. State Bank*, 18 Wis. 560; Rorer, Judicial Sales, § 576. The "adverse party" mentioned in the statute is one who has an interest adverse to the reversal of the matter appealed from. When the interest of the purchaser at the foreclosure sale has so ripened into title that subsequent proceedings in the case cannot affect his rights, then he is in no sense the "adverse party" contemplated by the statute.

But, should it be thought otherwise, the fact of the motion to dismiss the appeals having been made by respondent on his own behalf, and not on behalf of the purchaser at the foreclosure sale, would be sufficient reason for denying the motion. The purchaser being a *quasi* party to the suit, any proceeding in the case that would affect his interests, made without notice to him, cannot work prejudice to his rights. The respondent is in no sense a guardian of his interests, and cannot take advantage of the failure of appellant to advise the purchaser of subsequent proceedings in the case, if a notice, such as is mentioned, should be deemed essential.

Discussing the appeals on their merits, it seems quite clear that the ruling of the court in striking out the answer as frivolous was a very proper exercise of judicial power. The appellant having pleaded the same matter both in abatement and in bar of the action, by every analogy of practice the latter overrides the former. *Hooker v. Greene*, 50 Wis. 271.

That portion of the answer which alleges that respondent gave no consideration for the note and mortgage presents no issuable fact. It tends in no way to defeat the action. It is a matter of no moment to appellant whether any consideration was paid for the note and mortgage or not.

Under subsequent allegations in the answer, it appears that respondent became vested with and held the legal own-

ership of the demand sued upon. The appellant had no legal interest to inquire whether the respondent's interest was actual or colorable, or whether a consideration was paid therefor or not. *Sheridan v. New York*, 68 N. Y. 30. The rights of third parties not having intervened, payment of the note and mortgage to the appellant would have protected the mortgagor against all the world.

Drexler v. Tyrrell, 15 Nev. 114, was cited to support that portion of the answer wherein it is alleged that the note and mortgage were taken in the name of *Crowns*, for the purpose of concealing the same from the assessor, and thus escaping taxation. It is unnecessary to discuss this case. It is based upon the peculiar revenue laws of that state, which are referred to in the opinion, and has never been recognized as authority outside of its boundaries, so far as we have been able to discover. On the contrary, it has been severely and justly criticised in other jurisdictions, and is regarded as wrong in principle. Jones, Mortgages, § 619. It is not charged that the note and mortgage in suit were, in themselves, illegal or contravened the policy of the law. The contract between the parties was one they were not prohibited in making, and, so far as anything appears in the answer, the mortgagor received full and complete consideration for it. The only taint in the transaction is the alleged violation of the revenue laws. The law of this state provides that taxes shall be levied upon all the property in this state except such as is exempt. R. S. 1878, sec. 1034. Personal property shall be construed to mean and include, among other things, all debts due from solvent debtors, whether on account, note, contract, bond, mortgage, or other security, or whether such debts are due or to become due. Id. sec. 1036. The taxpayer may be examined under oath, and, if he makes a false statement of his property, he is subject to a penalty of ten dollars on every hundred dollars withheld from the knowledge of the assessor. Id. sec. 1056;

S. & B. Ann. Stats. sec. 1056*a*. When the revenue laws provide ample punishment for the evasion by taxpayers of their just dues, it would seem a monstrous injustice to permit a mortgagor to defeat the payment of his debt by bringing any such issue into a suit brought to foreclose his mortgage. The alleged turpitude of the mortgagee furnishes no ground for a discharge of the mortgagor from the payment of his just debt.

Thus it will be seen that, under any aspect, the answer of the appellant was "as a bowing wall or a tottering fence," and the ruling of the trial court in striking the same out was proper. No objection is urged to the judgment for deficiency that was not urged to the foreclosure judgment.

By the Court.— The motions to dismiss the appeals are denied, and the judgments of the superior court of Milwaukee county on both appeals are affirmed.

OLSON, Respondent, vs. OLSON, Appellant.

March 5 — March 22, 1898.

Divorce: Review on appeal: Counterclaim.

A judgment of divorce, granted to the plaintiff on the ground of desertion, will not be disturbed on appeal, where it appears that it was for the interest of both parties, although there was considerable evidence tending to show that the defendant was compelled to leave the plaintiff by reason of his cruel treatment, but the answer fails to allege such or any other fact as a counterclaim.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

The facts in the case are stated in the opinion.

For the appellant there was a brief by *John A. Oaks*, attorney, and *Alf. T. Johnson* and *Julius E. Roehr*, of counsel, and oral argument by *John A. Oaks*.

For the respondent the cause was submitted on the brief of *Christian Doerfler*.

CASSODAY, C. J. The plaintiff and defendant were married May 24, 1860, and lived together as husband and wife until September, 1883. They had four children, each of whom was of age before June 4, 1895. At that time this action was commenced for a divorce, on the ground that September 1, 1883, the defendant wilfully abandoned and deserted the plaintiff. The defendant answered by way of admissions, denials, and counter allegations, to the effect that the plaintiff deserted the defendant at the time mentioned, and that for twelve years he had failed to support her. At the close of the trial, the court found, as matters of fact, the marriage, the ages of the children, and the desertion of the plaintiff by the defendant as stated, and that all the allegations of the complaint were true, and that the plaintiff owned a lot described. And, as conclusions of law, the court found, in effect, that the plaintiff was entitled to a judgment of absolute divorce from the defendant, and that the defendant be divested of any and all right, title, and interest in and to the lot mentioned, and vested the same in the plaintiff; that the plaintiff pay the defendant, within twenty days, $100, in full of all right, title, and interest which the defendant might have in the plaintiff's property; and ordered judgment accordingly. From the judgment so entered, the defendant brings this appeal.

With some hesitation we are constrained to affirm this judgment. There is considerable evidence, however, to the effect that the defendant was compelled to leave the plaintiff by reason of his cruel and inhuman treatment; but the answer fails to allege such fact or any fact as a counterclaim. The printed case states that the plaintiff had two lots worth $700 each, but the bill of exceptions fails to sustain the statement. He admits he had one lot worth $475. We would have liked it better if the allowance to the defendant had been larger. It was for the interest of both parties that the divorce should be granted. The plaintiff,

however, cannot be allowed any costs, but must pay the defendant's taxable costs in this court.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

---

99 109
101 536

99 109
103 330
f104 480

99 109
105 150
105 151

99 109
107 312

99 109
110 [4]354

99 109
111 [4]317
d111 [6]660

99 109
117 [6] 43

HENNESEY, Administratrix, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 5—March 22, 1898.

Assumption of risk: Contributory negligence: Court and jury: Railroad company, liability of: Instructions.

1. For a railroad company to leave a ditch, ten inches wide and eight inches deep, beneath its track in its yard, open at the side of its track at a place where switchmen would naturally walk in the discharge of their duties, such ditch being constructed partly to allow free play to the switch rod and partly to drain the yard, does not, as a matter of law, constitute negligence on its part; but whether it did so or not, in a particular case, is a question for the jury upon the evidence.
2. Where, in an action against a railroad company for the death of a switchman who had worked for some time in and was familiar with its yard, caused by his falling into an open ditch located under its track between two ties and extending outside the track, while walking between and attempting to uncouple cars, there was evidence showing that the ditch in question was substantially different from the openings at the other switches and the danger to be apprehended was greater in degree as well as different in character, *held*, that it could not be said as a matter of law that he assumed the risk. MARSHALL, J., dissents.
3. It is not, as a matter of law, contributory negligence for a switchman to walk between cars which are moving slowly, for the purpose of uncoupling such cars, in a railroad yard where that method has been universal and has been practiced for a long time with the knowledge and approval of the yardmaster, and there was no rule or regulation to the contrary.
4. Where, in an action against a railroad company for the death of a switchman caused by his stepping into a ditch in its yard, al-

though the general question of contributory negligence was submitted, yet the jury were not instructed that an assumption of risk was a species of contributory negligence, and that if the deceased assumed the risk of unusual danger he was, in law, guilty of contributory negligence, the question whether a person of ordinary intelligence, with the experience of the deceased, in the exercise of ordinary care, should have observed the condition of the track before the day of the injury, and so have known the danger, should, on request, have been submitted to the jury as a separate question. MARSHALL, J., dissents.

5. In such an action, where no one saw the injury and the circumstances in evidence might well lead to different inferences in the minds of reasonable men, the question whether the death was the result of an unaccountable accident should, on request, have been submitted to the jury.

6. An instruction defining ordinary care as "such care as the ordinary person uses in the transaction of the ordinary affairs of life" is certainly inaccurate, if not positively erroneous.

APPEAL from a judgment of the superior court of Milwaukee county: GEO. E. SUTHERLAND, Judge. *Reversed.*

The plaintiff is the widow and administratrix of one James Hennesey, deceased, who was killed March 19, 1895, in the yards of the defendant in Milwaukee, and she brings this action to recover damages for his death. The ground of liability claimed is that the deceased, while performing his duties, caught his foot in an open ditch negligently maintained in the yard, and was consequently killed.

The evidence showed that the defendant has three yards at Milwaukee, one near the passenger station on the north side of the river, one at or near National avenue on the south side of the river, and the third one in the south part of the city, called the "farm yard," where empty cars are stored. Each of the yards contains a large number of switches, the "farm yard" having about fifty, and the two other yards having about the same number each. The deceased was foreman of the switching crew, and worked in all of the yards, as his duties required, sometimes going to the "farm yard" several times a day, and sometimes not at all during the day.

On the day of his death he went with a switch engine and switching crew to the "farm yard" to obtain some grain cars for the St. Paul Railway. The tracks in the "farm yard" run practically north and south. They entered the "farm yard" from the north, with the engine headed south. Hennesey was directing the work on the ground, and actively assisting in coupling and uncoupling the cars and directing the engine. The engine pulled a long string of freight cars from a switch track towards the north, onto the main lead track, and Hennesey was directing the cutting off of certain cars from the south end of the string, and setting them on switch tracks. He had made two cuts, doing the uncoupling himself, and he then signaled the engineer to go ahead across the same switch which he had just used, for the purpose of preparing to cut off two more cars. The engine pulled north over the switch, which was a split switch, and, when it had passed the switch sufficiently, Hennesey threw the switch, and gave the signal to go south again, for the purpose of cutting off the two south cars. As the cars began to move towards the south, Hennesey walked north, and met the cars north of the switch, and stepped in between the second and third cars, and walked along between the second and third cars, but with his feet outside of the track, and apparently attempted to pull the pin between the cars as he passed over the point of the switch. No one saw him alive after this, nor witnessed the accident. At this point of the switch, the switch rod passes under the tracks connecting the two rails; and under this rod there is a ditch between two ties about eight inches in depth, below the track, and ten inches in width, the purpose of which ditch is partly to allow free and unobstructed play of the switch rod, and partly to allow water to drain away across the yard, from west to east. The facts show that something serious happened to Hennesey at this point. The pin was not pulled, although it was found to be loose in the socket.

The forward wheels of the third car, for some unexplained reason, left the track to the east, and the brakeman at the head of the train, discovering some difficulty, signaled the engineer to stop, which he did within about twelve feet. The body of Hennesey was then found west of the tracks, on the ground, with his breastbone and back crushed in, as if caught between two unyielding bodies, but with no other injuries. He never spoke, and died within a few minutes. A part of the skirt of his coat was cut off on the track at the ditch, and his footprints ceased there. There was also, apparently, the track of a foot in the bottom of the ditch, just outside of the rail, and the appearance upon the ground south of the ditch and outside of the rail, as if a body had been shoved along. His left shoe was partially off, the heel being out of the shoe, and a marked dent or depression on the back of the shoe just above the heel. The theory of the plaintiff was that he accidentally slipped in this drain with his left foot, and caught his foot, and was thrown down and crushed under the projecting oil box of the following car.

At the close of the evidence, a motion was made by the defendant to direct a verdict for the defendant, on three grounds: (1) Because no negligence was proven on the part of the defendant; (2) because the plaintiff assumed the risk; and (3) because the evidence shows contributory negligence. The motion was denied, and a special verdict ordered and rendered as follows: "(1) Was James Hennesey injured while discharging his usual duties in the customary manner? Yes. (2) Was the switch and roadbed at the place of the accident constructed in the way such switches and roadbeds are usually constructed under like circumstances by persons of ordinary care and experience in like business? No. (3) Was the switch and roadbed defectively constructed? Yes. (4) If you answer the third question 'Yes,' then was the injury to James Hennesey proximately caused by such

defect? Yes. (5) If you answer the third question 'Yes,' then had such defect existed long enough for the defendant, with the use of ordinary diligence, to have known and remedied such defect? Yes. (6) If you answer the third question 'Yes,' then ought the defendant to have reasonably expected that such an injury as the one in question might probably occur as a result of not remedying such defect? Yes. (7) Was the defendant guilty of any want of ordinary care which proximately caused or contributed to the injury to James Hennesey? Yes. (8) Was James Hennesey guilty of any want of ordinary care which proximately caused or contributed to his injury? No. (9) What pecuniary loss has the widow of James Hennesey sustained by reason of his death? Five thousand dollars ($5,000)."

Upon this verdict a judgment for the plaintiff was rendered, and the defendant appeals.

For the appellant there was a brief by *Fish & Cary*, and oral argument by *R. N. McMynn*. They argued, among other things, that, in order to recover in this case, the plaintiff was bound to prove that the defendant did not exercise ordinary care to furnish to plaintiff's decedent a reasonably safe working place, judged by the standard of similar appliances furnished by other persons engaged in like business under like circumstances. *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482, 485–487; *Louisville & N. R. Co. v. Johnson*, 81 Fed. Rep. 679. She was also bound to show to a reasonable certainty that the injury complained of resulted from the negligence charged in the complaint, as the proximate cause. *Morrison v. Phillips & C. Const. Co.* 44 Wis. 405, 411; *Steffen v. C. & N. W. R. Co.* 46 id. 259, 265; *Gores v. Graff*, 77 id. 174; *Peterson v. Sherry L. Co.* 90 id. 83; *Ellison v. Truesdale*, 49 Minn. 240; *Wormell v. M. C. R. Co.* 79 Me. 397; *Barrett v. Smith*, 14 N. Y. Supp. 307; *Searles v. Manhattan R. Co.* 101 N. Y. 661; *Malone v. B. & A. R. Co.* 51 Hun, 532; *Taylor v. Yonkers*, 105 N. Y. 202. These

facts she has failed to show. The deceased, by accepting and continuing in the employment, the conditions of which were open and obvious, assumed the risks. *Naylor v. C. & N. W. R. Co.* 53 Wis. 661, 664; *Stephenson v. Duncan*, 73 id. 404; *Sweet v. Ohio Coal Co.* 78 id. 127, 130; *Corcoran v. Milwaukee G. L. Co.* 81 id. 191; *Herold v. Pfister*, 92 id. 417, 421; *Erdman v. Ill. Steel Co.* 95 id. 6, 11; *De Forest v. Jewett*, 88 N. Y. 264.

E. M. McVicker and *W. J. Turner*, for the respondent, contended, *inter alia*, that the question was fairly submitted to the jury, and they found that the switch, drain, and roadbed where the injury to plaintiff's decedent occurred were not constructed in the ordinary manner, but were defective, and the evidence supports the finding. *Borden v. Daisy Roller Mill Co.* 98 Wis. 407; *Powell v. Ashland I. & S. Co.* id. 35. *Assumption* of risk is not established by mere proof of facts upon which a presumption of knowledge may be formed. It should rest upon positive knowledge. *Jensen v. Hudson S. M. Co.* 98 Wis. 73; *Dorsey v. Phillips & C. Const. Co.* 42 id. 583; *Kennedy v. L. S. T. & T. R. Co.* 93 id. 32; *Paine v. Eastern R. Co.* 91 id. 340; *Snow v. Housatonic R. Co.* 8 Allen, 441; *Hannah v. Conn. R. R. Co.* 154 Mass. 532; *Plank v. N. Y. C. & H. R. R. Co.* 60 N. Y. 607; *Ill. Cent. R. Co. v. Sanders*, 166 Ill. 270; *McDougall v. Ashland Sulphite-Fibre Co.* 97 Wis. 382. An employee does not assume risks of those dangers which are known to and can be obviated or avoided by the employer by the exercise of reasonable care and caution. *Curtis v. C. & N. W. R. Co.* 95 Wis. 468; *Promer v. M., L. S. & W. R. Co.* 90 id. 220; *Colf v. C., St. P., M. & O. R. Co.* 87 id. 276.

WINSLOW, J. The defendant claims here, as it claimed below, that no case was made by the plaintiff, because (1) the evidence showed no negligence on its part; (2) the plaintiff's intestate assumed the risk; and (3) because he was guilty of contributory negligence.

We are unable to say, as matter of law, that a verdict should have been directed upon either of these grounds. The evidence was entirely sufficient to take to the jury the question whether leaving an open ditch in a railroad yard of the width and depth of the one in question, under and at the side of the track where switchmen would naturally walk, was not an act of negligence. The evidence was ample that such ditches did not exist in the yards of other companies, or even in the other Milwaukee yards of the same company.

The question of assumption of risk is one of greater difficulty. The ditch had existed in the same condition for a long time, and the intestate was familiar with the yard. There was evidence that all or nearly all of the switch rods in the farm yard had openings or ditches under them of the same general character as the opening in question, for the purpose of giving free play to the switch rod; but there was also positive evidence by at least one witness acquainted with the yard that the openings under the other switch rods were much shallower than the one in question. And a number of witnesses who testified to the existence of similar openings at the other switches admitted that the other openings were simply intended to allow free play to the switch rod, while the opening in question constituted a part of a continuous ditch passing for a long distance transversely under several tracks for the purpose of draining the yard. The evidence also clearly showed that, in the two other yards of the company where the deceased spent the greater part of his time, there were no such ditches, but that all such drains were covered. If the accident to the plaintiff's intestate was in fact caused by his stepping into the ditch and his foot becoming wedged in between the ties, as the condition of his foot and shoe when found may perhaps indicate, it is very evident that the depth of the ditch was one important and efficient element in working the mischief. A ditch two or

three inches deep would probably present no such possibility, or at least only in a comparatively slight degree. Had it been clear and undisputed that all the switches in the yard had similar deep ditches under them, it might with reason be claimed that a man who had worked for any considerable time in the yard would be held, as matter of law, to have assumed the risk. *Paine v. Eastern R. Co.* 91 Wis. 340. But there being evidence tending to show that the ditch in question was substantially different from the openings at the other switches, and the danger to be apprehended greater in degree as well as different in character, it cannot be said, as matter of law, that the intestate assumed the risk because he had not seen and appreciated the special danger at this one switch. *Colf v. C., St. P., M. & O. R. Co.* 87 Wis. 273; *Paine v. Eastern R. Co., supra; Curtis v. C. & N. W. R. Co.* 95 Wis. 460.

Nor can it be held, as matter of law, that the deceased was guilty of contributory negligence because he attempted to uncouple the cars while they were slowly moving. There was evidence that this method of uncoupling was well-nigh universal in the yards of the company at Milwaukee, and that it had been practiced with the knowledge and tacit approval of the yardmaster for years; and no rule or regulation was shown to the contrary. So, under familiar principles, the question became one for the jury. *Curtis v. C. & N. W. R. Co., supra.*

There were, however, two questions which the defendant requested should be incorporated in the special verdict, which were denied, and which, we think, should have been submitted in some form. These questions were as follows: (1) "Ought a person of ordinary intelligence, with the experience of deceased, in the exercise of ordinary care, to have observed the condition of the roadbed, switch, and track at the place in question, prior to the day of his injury, and to have known the danger to be apprehended there-

from?" (2) "Was the death in question the result of an unaccountable accident?"

The first of these interrogatories presents the question of assumption of risk, which was one of the most vital questions in the case. It is true that it has been held by this and other courts, and logically, we think, that assumption of the risk of unusual danger is a form of contributory negligence. *Darcey v. Farmers' Lumber Co.* 87 Wis. 245. It is true, also, that the general question of contributory negligence was submitted to the jury in question 8 of the special verdict. Now, had the jury been carefully instructed upon the question of assumption of risk, and plainly told that it was a species of contributory negligence, and that, if they found that deceased did assume the risk of such unusual danger, then he was in law guilty of want of ordinary care, and the question must be so answered, there would probably be no error in refusing to submit the specific question asked for, because the issue would thus have been covered. But there were no such satisfactory and clear instructions on this point as to place the jury in position to appreciate that, in answering the question, they were also passing upon the question of assumption of risk. While, as before said, assumption of unusual risk is a form of contributory negligence, it is a specific phase of such negligence, and is not likely to be so considered by a jury without careful and specific instructions. If not so covered, it should in a case like the present be submitted in a separate question.

The second question asked and refused was whether the injury was the result of a pure accident. This is a case where that question should have been submitted. No one saw the injury, and the circumstances in evidence may well lead to different inferences in the minds of reasonable men. It may well be that, if this question had been submitted with proper instructions, the jury would have answered it in the affirmative; and, had such been the answer, we are unable to see

how the verdict could be disturbed. *Kucera v. Merrill Lumber Co.* 91 Wis. 637.

There were also errors in the charge which should be corrected upon a new trial. The jury were told that proximate cause means "the direct and immediate cause." This subject has been so frequently and recently reviewed by this court that it is unnecessary to go over it again. The true rule will be found stated in numerous recent cases. The definition of ordinary care as "such care as the ordinary person uses in the transaction of the ordinary affairs of life" is certainly inaccurate, if not positively erroneous. *Duthie v. Washburn*, 87 Wis. 231.

Other errors are assigned, but we do not deem it necessary to discuss them.

By the Court.— Judgment reversed, and action remanded for a new trial.

MARSHALL, J. I concur in the decision reversing the judgment of the court below, but not in all that is said in the opinion. In order that my position may appear when the question shall be hereafter presented, I file a separate opinion.

It is the established doctrine of this court that assumption of risk is a form of contributory negligence, and therefore included within that general term. Such was the decision most distinctly made in *Powell v. Ashland I. & S. Co.* 98 Wis. 35, citing several previous decisions on the subject, to which others might be added. As there said, no distinction in fact exists between contributory negligence and assumption of risk, and those authorities that make one only tend to confusion and uncertainty in a most important branch of the law. That is not the announcement of any new doctrine. It merely states more distinctly, perhaps, than heretofore, what has been repeatedly decided, and is in accordance with the most reputable of the older text writers.

Speaking of the situation of master and servant where the former subjects the latter to more than ordinary risks, and the latter accepts service with the added danger, in *Hazen v. West Superior Lumber Co.* 91 Wis. 208, it was said, in substance: Where a defect or unusual danger is open and obvious, although the employer may be said to be guilty of negligence in keeping his premises in that condition, the *employee is also guilty of negligence in accepting service and continuing in it under the circumstances.* In the second American edition of Smith's work on Negligence, at pages 494, 495, the text on the subject of the relations of the parties where there is assumption of risk, is, in substance, as follows: There is a contract of mutual consent on both sides, to accept the existing state of things. The master is said to be guilty of negligence in keeping his machinery in a dangerous state, and *the servant is guilty of negligence in accepting service*, or in his acts, as the case may be. Although the master may prevent the danger by ordinary care, still he is not bound to do so by reason of the consent of the servant to the existing state of things, and therefore the servant's negligence is equivalent to contributory negligence. How reasonable this doctrine is, when viewed in the light of that fundamental principle of the law of negligence, that it consists in a departure from the standard of ordinary care, as applied to the conduct of any one in the performance of duty to himself or another, as respects personal safety. The fact that the departure is a matter of contract does not militate at all against its being negligence,—the invariable test being whether the conduct is consistent with ordinary care. A person may contract to do work under conditions more than ordinarily dangerous, and therefore have no right to recover for injuries sustained by reason thereof; nevertheless, the voluntary submission to the dangerous situation is negligence, and, if injury results, is contributory negligence.

It follows necessarily that the general question of whether there was want of ordinary care on the part of the plaintiff, which contributed to his injury, covered the whole field of efficient contributory negligence. Therefore, if the charge was not broad enough to properly explain the question, the error was in the faulty character of the charge and not in failure to submit an independent question. This court has very frequently held that mere failure to fully instruct on a question of law is not reversible error, unless a more full and explicit instruction on the subject is requested and refused. To hold otherwise in this case, to my mind, is to recognize a distinction between contributory negligence and assumption of risk, while we say, in fact, the former includes the latter, thereby promoting the very confusion which it should be the constant aim of courts to prevent, to the end that remedies in this very important class of cases, which occupies a great part of the attention of courts, may be administered with the greatest practicable economy and certainty.

My brethren say, had it been clear and undisputed that all the switches in the yard had small deep ditches in them, that it might with reason be claimed that a man who had worked for any reasonable time in the yard would be held, as a matter of law, to have assumed the risk. That observation is quite right, inasmuch as in *Paine v. Eastern R. Co.* 91 Wis. 340, and many other cases that might be cited, this court so distinctly held, though there are cases that may be read to support a contrary doctrine, and that assumption of risk does not appear from evidence, as a matter of law, unless it shows conclusively that the *precise risk was actually known* and appreciated. Cases that may be so read are exceptional, and, it may be safely said, were not intended to go that far, though it must be admitted that the use of language to the effect that evidence does not conclusively establish contributory negligence unless it shows that the

injured party knew and appreciated the precise danger, as in *Dorsey v. Phillips & C. Const. Co.* 42 Wis. 583, is liable to be so construed. There are repeated decisions of this court, that if a person either knows, or by reasonable attention to his surroundings would know, the dangers, he is remediless for any injury received therefrom, and that the term, "appreciate the risk," has no proper application to a person of mature years and ordinary intelligence and experience, for such person is bound to both know and appreciate such risks. Said Mr. Justice PINNEY, speaking for the court in *Hazen v. West Superior Lumber Co.* 91 Wis. 208: "Where a defect or danger is open and obvious, although it exists in consequence of the negligence of the employer, still, knowledge of it on the part of the employee of mature years will be presumed." Cases in respect to minors or inexperienced persons are inapplicable to such situations. So in *Peterson v. Sherry Lumber Co.* 90 Wis. 83, in an opinion sustaining a direction of a verdict for the defendant on the ground of assumption of risk, the court said, in effect, that a person of mature years and experience in his work is presumed to know and appreciate all dangers obvious to a person of ordinary intelligence and prudence under the circumstances. To the same effect are *Jones v. Sutherland*, 91 Wis. 587; *Sweet v. Ohio Coal Co.* 78 Wis. 127; *Stephenson v. Duncan*, 73 Wis. 404, and many other cases that might be cited.

From the foregoing I cannot concur in that part of the opinion to the effect that it was a question for the jury whether the deceased knew and appreciated the danger. The deceased had worked for months where his duties required him to be frequently, every day, in the yard. He was one of the most experienced men in the switching crew, as he was the foreman of it. Therefore, within the rule above discussed, in my judgment, as a matter of law, he was bound to know and appreciate the dangers to which he was subjected by reason of the manner in which the switches

were placed. To apply the rule to such cases, applicable to minors and inexperienced men, by submitting the case to the jury to find whether the injured person appreciated the risk, seems to violate a firmly established principle of law. The supreme court of the United States, in *Southern Pacific R. Co. v. Seley*, 152 U. S. 145, very recently dealt with this precise question. The injured person was not regularly employed as a brakeman or switchman, and in that respect the instant case is much stronger for the application of the rule under discussion. He had been in the employ of the railway company for some time, and had frequently been in the railway yard where he was injured, whereby he had opportunity to see that the frogs of the switches were all unblocked, in one of which, while attempting to make a coupling, his foot was caught and he was thereby injured. The court held that it must be assumed that he knew the condition of the frog, and assumed the risk incident to working in the railroad yard in that condition.

From the foregoing it is quite clear to my mind that the evidence, even as understood by my brethren, shows conclusively that the deceased assumed the risk of the depression in the ground at the switch, which it is claimed was the cause of his death. The danger was not concealed in any way. He must have seen it if he exercised the slightest attention to his surroundings. On the subject of whether the open switch ditch was in use universally in the yard, as I read the evidence, it is without any substantial conflict, bringing the case clearly within *Paine v. Eastern R. Co.* 91 Wis. 340.

It follows that while I concur with the reversal, I dissent from the criticism upon the refusal of the trial court to submit a special question on the subject of assumption of risk, and from the decision that the question of contributory negligence was for the jury. I think the verdict should have been directed for the defendant.

It may be said that the rule, that assumption of risk is a defense to the master's negligence, is a harsh one, but if so, it being the settled law, courts cannot properly bend it one way or the other to meet the special hardships of particular situations. That in cases of this kind there is sometimes that refinement of reasoning and tendency to distinguish, liable to lead to the belief that the legal principles involved are so elastic as to be quite indefinite and uncertain, instead of well defined and rigidly applied, is not without some support, however careful courts may be to avoid it. But the fact remains that while the circumstances of cases must necessarily be different, a principle of law must govern all alike that come within it. That is recognized by all, but *all* do not understand the facts of particular cases alike; so, while working with the same end in view, all do not always reach a common judicial result.

---

99 123
99 536

99 123
103 659
104 641

99 123
105 7

99 123
106 177
f106 584
f106 628

99 123
107 425
107 432
108 192
108 225

99 123
109 32

99 123
j113 406

99 123
114 178

THE STATE EX REL. HEIDEN, Plaintiff in error, vs. RYAN, Defendant in error.

March 5 — March 22, 1898.

Supreme court: Jurisdiction in habeas corpus.

Sec. 3409, R. S. 1878, vests in the supreme court and the justices thereof exclusive jurisdiction to issue writs of *habeas corpus* to inquire into the legality of the detention of persons confined in the state prison, and that applies where the detention is in the house of correction of Milwaukee county in lieu of in the state prison at Waupun, under the statute permitting confinement in such house in lieu of such prison.

[Syllabus by MARSHALL, J.]

CERTIORARI to review an order of HUGH RYAN, Court Commissioner in Milwaukee county. *Reversed.*

One Peter Roszcynialla, while on bail to appear at a term of the municipal court for Milwaukee county to answer to a

charge of burglary, was duly sentenced by a justice of the peace to the house of correction for the term of six months for the offense of larceny, and was committed accordingly. The petitioner, *Fred Heiden*, was the keeper of such house of correction under the official name of Inspector of the House of Correction of Milwaukee County. While Roszcynialla was serving the sentence for larceny, he was taken before the municipal court for the county and there pleaded not guilty to the information filed against him on the charge of burglary, and was thereupon tried and convicted of such offense, being represented from first to last by his attorney, and making no objection to the trial on account of the fact that he was in custody, serving the sentence for larceny. He was duly sentenced on the last conviction to the house of correction for the term of two years, commencing November 13, 1897, the day such sentence was pronounced, and was committed accordingly. Thereafter, claiming that he was unlawfully restrained of his liberty on the second conviction, he sued out, before the respondent, *Hugh Ryan*, as court commissioner for Milwaukee county, a writ of *habeas corpus*, on a petition setting forth facts as aforesaid, and further facts to show that the term of imprisonment for the first sentence had expired. The petitioner produced Roszcynialla in response to the writ, and made return, among other things, that he held him pursuant to a commitment on the sentence for the offense of burglary. On the hearing the commissioner determined that the first sentence had not expired, but that all the proceedings in regard to the second trial, and the commitment pursuant thereto, were void because defendant was in custody at the time of such trial, serving the sentence for larceny. Thereupon an order was entered remanding Roszcynialla to serve out the first sentence, and that at the expiration thereof he be discharged. He was remanded accordingly, and on petition of the keeper of the house of correction, setting up all the facts, a writ

of *certiorari* was issued, requiring all the proceedings before the commissioner to be certified to this court for review.

For the plaintiff in error there was a brief by *A. C. Brazee*, district attorney, and a supplemental brief by *Levi J. Billings*, for the Attorney General, and oral argument by *A. C. Umbreit.*

C. W. Briggs, for the defendant in error. [No brief on file.]

MARSHALL, J. Several important questions are presented for decision by the briefs of counsel, that it would promote the due administration of justice to determine, most of which must remain for further consideration, however, because of the conclusion reached as to the jurisdiction of the commissioner. Whether a person can be tried on one offense while he is serving a sentence for another, and whether, if he makes no objection to such trial by proper plea in abatement or otherwise, he can thereafter raise the question, and whether the court commissioner can act as a court of review and vacate final orders and judgments of trial courts, and, if the power exists, whether, in any case, a wise administration of the duties of the position requires that it should not be exercised except in cases of necessity growing out of the inability of the judge to act, or inconvenience in reaching him in a particular case, are all important questions, a solution of which might serve well the orderly and safe administration of justice; but they must go unanswered for the present for reasons disclosed in what follows.

Under sec. 4637, R. S. 1878, all offenses punishable by imprisonment in the state prison are felonies. By sec. 3409, R. S. 1878, the exclusive jurisdiction to issue writs of *habeas corpus*, to inquire into the legality of the detention of persons confined in the state prison, is vested in the supreme court and the justices thereof. The constitution conferred jurisdiction to issue the writ upon the supreme court and the

circuit courts, but the legislature was given power to confer such jurisdiction upon other courts and judicial officers. By the statutes of 1849, jurisdiction to issue the writ was conferred upon justices of the supreme court, of the circuit courts, and county courts. In the statutes of 1858 court commissioners were added. By ch. 45, Laws of 1864, power to issue the writ, in cases of confinement in the state prison, was restricted to the supreme court and the justices thereof, as now provided in said sec. 3409. The effect was to take from all courts and officers, except those specially named, power to issue the writ in any case of confinement for an offense of the degree of felony. While, when the law was enacted, there was but one place of confinement for persons guilty of such offenses, to wit, the state prison at Waupun, it would not seriously be contended but that other places of confinement for the same grade of offenses, subsequently established, would be state prisons by implication though called by some other name. The real purpose manifestly was to limit the jurisdiction more to the purpose of the confinement than to the place. As confinement in the state prison was solely a punishment for the higher grade of offenses, the name of the place satisfied the legislative intent. By ch. 256, Laws of 1879, the jurisdiction of the circuit court for Milwaukee county, in criminal cases, was conferred upon the municipal court for such county. By sec. 2514, S. & B. Ann. Stats., in any case of conviction in such municipal court, where the punishment would otherwise be imprisonment in the state prison for a term not exceeding three years, the offender may be sentenced to confinement in the house of correction instead of the state prison. As to such offenses, the house of correction, by the statute, is, to all intents and purposes, a state prison.

The mere fact that the offender may be sent to the house of correction, instead of the state prison at Waupun, does not affect in any way the grade of the offense. All the rea-

sons for removing persons convicted of crimes of the grade of felony beyond the reach of the writ of *habeas corpus* issued by local courts and officers apply just as strongly whether the place of confinement be the house of correction in Milwaukee county or the state prison at Waupun. To hold otherwise would sacrifice the obvious spirit of the statute to the letter of it. It is not the duty of the courts in declaring the law to do that, but rather, in the light of the evils to be reached,— the objects to be attained,— to so construe it as to give it effect according to the legislative intent, so far as that can be done without violence to its language. To accomplish that end the terms of the law can be given a literal, a liberal, or a strict construction, as to the court may seem best calculated to carry out the real purpose of the lawmakers. *Ogden v. Glidden*, 9 Wis. 46; *Blunt v. Walker*, 11 Wis. 334; *Clark v. Janesville*, 10 Wis. 136.

True, there is reason for saying the construction we give to sec. 3409, R. S. 1878, conflicts with the literal sense of words in which there is no obscurity, but, as said in effect by an eminent writer on statutory construction, uncertainty of sense, requiring judicial construction, does not always spring from uncertainty of expression. Words may be plain, yet their literal meaning lead to such consequences that courts must, necessarily, violate the letter in order to reach the real spirit of the law and give effect to the legislative will. The legislative idea, if it can be gathered from the language used, by all the light to which the judicial mind may properly resort, is as much within and a part of the law as if it were literally expressed. *People ex rel. Att'y Gen. v. Utica Ins. Co.* 15 Johns. 379; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 300. Vattel says: "It is not allowable to interpret what has no need of interpretation. When the meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which the words naturally represent. To go elsewhere in

search of conjecture in order to restrict or extend the act would be to attempt to elude it. Such a method, if once admitted, would be exceedingly dangerous, for there would be no law however definite and precise in its language, which might not, by interpretation, be rendered useless." This sound doctrine is recognized by this and all courts (*Gilbert v. Dutruit*, 91 Wis. 661), and it supports the construction we give to the law in question.

While the meaning of the words "confined in the state prison," generally speaking, is evident, to hold to the literal meaning of the term would lead to a most absurd conclusion; so we are not only permitted, but required, to search for some other meaning which is reasonable in order to avoid that result and give that effect to the law obviously intended. No serious difficulty in that regard is encountered when we apply that other rule, laid down in *Harrington v. Smith*, 28 Wis. 43, and so often referred to and applied by this court: "The true rule for the construction of a statute is to look to the whole and every part of it, to the apparent intention derived from the whole, to the subject matter, to the effect and consequences, the reason and spirit of the law, and thereby ascertain the true meaning of the legislature, though the meaning so ascertained conflict with the literal sense of the words."

By the Court.— The order of the commissioner is reversed, and the proceedings remanded with directions to dismiss the writ of *habeas corpus* as improvidently granted.

HENNESSY, Respondent, vs. DOUGLAS COUNTY and another, Appellants.

January 11—April 12, 1898.

Municipal corporations: Superior city charter: Assessments for street improvements: Notice: Constitutional law: Due process.

1. Where a city charter requires assessments for street improvements to be made according to the benefits accruing to the several lots, a report of the board of public works of such city that they have assessed the lots benefited by such improvements according to benefits shows a compliance with the charter, although it may also show that the apportionment to lot owners was according to the number of front feet owned by them respectively, abutting on the street. An apportionment according to front feet is not necessarily erroneous. *Hayes v. Douglas Co.* 92 Wis. 429, distinguished.
2. That an assessment was ordered only on property fronting, abutting, and adjacent to a certain street for improvements thereon, does not, as a matter of law, unduly limit the district benefited, in the absence of proof that there was any outside of that limit which would be benefited.
3. The charter of the city of Superior does not require the published notice of the determination of the amount of assessments for street improvements to be made against lands benefited to have any particular address. It will be sufficient if addressed to all whom it may concern.
4. Proceedings for levying sewer assessments in accordance with provisions in the city charter requiring the publication of notices showing a plan of sewerage; the order of the council for the construction of the sewer when the contract therefor has been let; the opportunity given to the lot owner to pay the assessment or have bonds issued; and the placing of the assessment on the tax list, are not subject to objection as being a taking of property without due process of law.
5. Assessments for the building of sidewalks are valid if made in pursuance of the city charter, although that does not provide for the giving of any notice of the proceedings to lot owners except the annual entry in the tax rolls.
6. In respect to lots to be assessed for street improvements, the term "adjacent" means "lying near, close to, or contiguous, but not actually touching," while the term "adjoining" indicates that they are "so joined or united that no third body intervenes."

99 129
103 220
[1]103 232
99 129
105 224
99 129
[4]106 204
99 129
108 669
99 129
115 [8]250
60 LRA 173n
60 LRA 215n
99 129
117 [1]165

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed in part; reversed in part.*

The facts are stated in the opinion.

H. H. Grace and *H. C. Sloan*, for the appellants.

For the respondent there was a brief by *Knowles & Wilson*, and oral argument by *Geo. P. Knowles.*

PINNEY, J. The plaintiff, the owner of a large number of vacant and unimproved lots in the city of Superior, brought this action to set aside various tax certificates of sale belonging to the county of said lots for general taxes for different years, on the ground of illegality of the assessments for the years in which the taxes were imposed, whereby his property had, as he alleged, been subjected to an excessive burden. The action was also brought to set aside various special assessments for street improvements, sewers, and sidewalks, alleged to be illegal and void. The answer denied the allegations of the complaint specifically, and alleged that all such proceedings, taxes, and assessments were regular and valid. The defendants pleaded the several bars and statutes of limitations contained in the city charter, and the limitation of one year prescribed by sec. 1210*h*, S. & B. Ann. Stats. At the trial it appeared that the general assessments for the years 1892 and 1893 should be set aside, and, to avoid the necessity of reassessment for those years, certain computations and stipulated reductions were made, whereby certain sums were to be paid by the plaintiff as a condition of relief as to said general taxes and tax certificates, and all questions in relation thereto were thus eliminated from the case.

By the final judgment appealed from by the defendants the court set aside certain street-paving taxes, namely, the P street paving taxes, the West Fifth street paving taxes, the West Seventh street paving taxes, certain sewer taxes, and certain sidewalk taxes. The appellants assign for error

the decision of the court setting aside the said special taxes and assessments, insisting that they should have been sustained.

The court found, among other things, that all notices and orders required by the charter to be published or posted in relation to said proceedings, and set forth in the findings, were duly and regularly published, and all proceedings relating to said taxes and assessments, except as set forth in said findings, were and are legal, valid, and sufficient; and that no other evidence had been introduced or objections urged to set aside said special taxes or assessments, except as so shown and set forth.

The special assessments for improvements by paving streets involved are for such improvements on P street, West Fifth street, and West Seventh street. The points in relation to said assessments are substantially the same, and the plaintiff contended that they were all made in the same manner and had a common vice, namely, that in each case the whole amount of benefits assessed for the entire improvement had been divided by the number of feet fronting on the improvement, and that the benefit to each front foot so found, multiplied by the number of front feet on each parcel, produced the benefit which was assessed against such parcel, and that it nowhere appeared that the board which made the assessment had considered and passed upon all questions made material by the statute; that nothing was shown upon the face of the proceedings to indicate that the result at which the board of public works had arrived was other than that the assessments were according to the front-foot rule, and that they were therefore the same in substance as in the case of *Hayes v. Douglas Co.* 92 Wis. 429, and were void under that decision. These assessments were made under the charter of 1891, differing in its provisions from the charter of 1889, under which the decision in *Hayes v. Douglas Co.* was made.

Sec. 117 of the charter [Laws of 1891, ch. 124] provides that the opening, grading, paving, or improvement of any street "shall be chargeable to the lots or parcels of land benefited thereby, in proportion to the benefits secured thereto."

It is provided by sec. 119 that "before any established grade shall be changed or any work shall be ordered done on any streets, in whole or in part at the expense of the *abutting or adjacent* real estate, the board of public works shall view the premises and determine the damages and benefits which will accrue to each parcel of such real estate by such change or alteration of grade; the entire cost of the contemplated work or improvement on the street, the benefits and damages that will accrue to the several parcels of such real estate by such work or improvement, and *the amount that should be assessed* under the provisions of this chapter, to each parcel of such real estate to be benefited, *as benefits* accruing thereto by such contemplated work or improvements."

The board is required to make and file in their office a report showing their determination of the questions required to be considered by them under the provisions of said section; and it is provided by sec. 121, that notice shall be given by said board by publication in the official newspaper of the city, at least once in each week for two successive weeks, that such report is open for review at their office, and that on a day and hour named therein the board will be in session to hear all objections that might be made to said report; that no irregularity in the form of said report or of said notice should affect the validity of the same, if it fairly contained the information required to be conveyed thereby. At the times specified the board is required to hear all parties interested who might appear for that purpose, and to reduce to writing all objections that might be made, and all evidence that might be offered, to sustain the same, and is given

power to review, modify, and correct said report as they shall deem just, and thereupon a *complete and final report* shall be made and filed with the city clerk, together with all objections and evidence taken before them to sustain the same, with proof of publication of the said notice; and it is provided that no irregularity in the form of the report or manner of conducting the proceedings of the board should affect the legality of such report. The city clerk is required to file the same, and at the next meeting of the council thereafter to notify the council thereof, and the council may take such action on the same as it may deem advisable. If no action is taken by the council, the report should be deemed confirmed.

Sec. 123 provides that, subject to the limitations mentioned, the common council, through the board of public works, "may determine the amount to be paid by the real estate to be benefited *as benefits* on account of the improvement of the street, and the amount that shall be paid by the city at large."

Sec. 124 provides that when the report of the board of public works, as made by them, or as changed or modified, has been confirmed, the city clerk shall publish notice in the official newspaper of the city once in each week for two successive weeks that a final determination has been made as to the damages that will accrue to the real estate abutting on the street, in case of change in the establishment of the grade, or the benefits to be assessed to the real estate to be benefited in case of any proposed improvement; provided, that, in case the contract was let for less than the whole amount of the benefits assessed, the board of public works might reduce the same to the actual cost of the work.

By sec. 125 the owner of any parcel of land mentioned in such notice, feeling himself aggrieved by reason of the determination made, might appeal within twenty days thereafter to the circuit court, and provision was made for the trial and disposition of said appeal.

By sec. 126 it was provided that the appeal given by sec. 125 from the report of the board of public works, as confirmed by the common council, should be the only remedy of the owner of any parcel of land, or any person interested therein, affected by said improvement, for the redress of any grievance he might have by reason of making such improvement, or by reason of the change of any established grade covered by said report.

The preliminary report of the board of public works in the matter of the P street improvement was that, in compliance with the resolution passed by the common council, May 23, 1891, "ordering this board to view the property *fronting* and abutting to P street, between Bay street and West Seventh street," to determine the entire cost of paving said street between said points, and, further, to determine the *benefits and damages* accruing to, *and the amount that should be assessed* to, each lot or parcel of land *benefited* by reason of such improvement, on the 18th day of June, 1891, they did view the said property, and had determined the entire cost of said proposed improvement, and had further "determined the *damages and benefits* which will accrue to, and the *amount which should be assessed as benefits* to, each said lot, piece, or parcel of said real estate by reason of said proposed improvement;" that their determination upon all of said matters was fully set forth in the schedule thereto attached.

The final and corrected report was made July 9, 1891, reciting the reference to the board of public works; stating, also, that they had viewed the premises *fronting, abutting upon, and adjacent to P street* between the points named, and determined the entire cost of paving and otherwise improving the said street, and the *benefits and damages* accruing to, and the *amount* that should be assessed *as benefits* against, said property benefited between said points by reason of said proposed improvements. It recited, also, that they had viewed the said premises on the 18th of June,

1891, and had on that day made their preliminary report as hereinbefore stated; that notice, proof of publication of which was thereto attached, was issued by said board, and published in the official newspaper of the city, advising all persons owning property between said points that said report was on file in the office of the board of public works, and would be open for review for a period of twenty days from the date of the notice; and that on the 9th day of July, 1891, from 10 o'clock to 11 o'clock a. m., the board would be in session to hear any and all objections that might be raised to said report or to anything therein contained; that at said time the board was in session one hour for said purpose, and, no objection having been raised to said report, the board thereupon, on said day, made its complete and final report on all of said matters, and filed the same with the city clerk; that the determination of the board upon all of said matters was therein set forth in the schedule thereto annexed and made a part thereof, which was accompanied with a plat showing the situation of the property, from which it appeared that all lots fronting on P street, except those in block 31, were assessed at a uniform sum of $425.48, and had a front on the street of 125 feet, so it would appear that the assessment was about $3.45 per front foot; that block 31 had 290 feet front, and was assessed for $1,355.03, or about $4.67 per front foot, as was contended by the plaintiff.

In respect to the paving of West Fifth street and West Seventh street, the proceedings, and preliminary and final reports, were *substantially the same* as in respect to P street, except that the plats and schedules tended to show that the proportion of the entire benefits assessed to each lot as benefits corresponded with the number of feet front of each lot fronting on the street, and was coincident with the area of the lots. In the improvement on P street the lots are 60x135, the length of the lots abutting on the side of the street, and

in assessing benefits the board apparently determined that one half of the block was benefited, and placed an assessment on three lots in the block as abutting on and adjacent to the street. On West Fifth street the lots were 20x135 and 60x135, the width or end abutting on the street, while the lots extended back to the center of the block. As to the West Seventh street paving, the location of the lots in respect to the street is substantially the same as in the West Fifth street assessment.

The effect of the statute thus stated is that the reports of the board of public works, preliminary and final, as confirmed by the council, determine the limits of the assessing or taxing district as to each improvement ordered, and in each instance it consists of the *abutting or adjacent* real estate benefited by the improvement, and within the limits of each such district the board of public works determined and reported the *benefits and damages* which would accrue to the several parcels of such real estate by such work or improvement, and the *amount* that should be assessed, under the provisions of the charter, to each parcel of such land abutting on or adjacent, to be benefited, *as benefits* accruing thereto by such contemplated work or improvement. The action of the board of public works, and of the common council in confirming the same, determined the extent of such assessment districts and the amounts to be charged or assessed *as benefits* against the lots benefited, and was conclusive, subject to alteration on appeal as specified in the charter; the action of the board of public works and common council in relation to said matters being of a *quasi* legislative character. *Teegarden v. Racine*, 56 Wis. 545. Not only the real estate *abutting* on the street, but *adjacent* real estate, may be included in such taxing district, and so assessed for the contemplated work and improvement. "Adjacent" signifies, in this connection, "lying near, close to, or contiguous, but not actually touching." The distinction be-

tween "adjacent" and "adjoining" seems to be that the former implies that the two bodies are not widely separated, though they may not actually touch, while "adjoining" indicates that they are so joined or united that no third body intervenes. Anderson, Law Dict.; Elliott, Roads & S. 391; *Massing v. Ames*, 37 Wis. 651, 652. The word "adjoining," in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent. *Holmes v. Carley*, 31 N. Y. 289; *In re Ward*, 52 N. Y. 397. There is nothing in the statute that required the length of the lot frontage on the street, in whole or in part, or the area of lots abutting thereon or adjacent thereto, to be stated or included in the report of the board of public works.

It was argued on behalf of the plaintiff that, because the words "feet front" and "number of feet per lot" appear in the tabulation and schedules annexed to the reports, the benefits assessed were coincident with the area of the lots or number of feet frontage, and hence that the assessment of benefits was made, as in the case of *Hayes v. Douglas Co.* 92 Wis. 429, according to the front-foot rule, and that thereby the positive statements in the certificates and reports of the board of public works that the assessment was made according to the *benefits* secured to each lot assessed were rebutted and overcome, inasmuch as the entire assessment in front of any lot or parcel, divided by the number of feet frontage, produced a uniform sum, assumed to be the rate of the assessment per front foot. In the case of *Hayes v. Douglas Co.* the assessment showed that the amount assessed against each lot corresponded in like manner with the number of feet fronting on the street improved, but that case is clearly distinguishable from the present. The evidence of the engineer there was that the general method of making assessments was to take the whole number of feet frontage on the street, and divide the cost by the number of feet, and assess it at so much per foot; and this was sustained by the

testimony of other members of the board of public works. There is no such evidence in the present case, but the inference is attempted to be drawn from the data stated that the assessments here in question were made according to the same erroneous rule. In that case the court found as a fact that "the amount to be assessed back as benefits per front foot *was found by dividing the entire cost* of the improvement by the number of feet frontage on both sides of that part of the street or avenue to be improved." The reports did not, as in the present case, certify or assert that the assessment was according to the *benefits* accruing to such lot or parcel of real estate by such improvement.

The validity of these assessments is to be determined from what appears upon the face of the proceedings, substantially as if on a demurrer thereto. No extrinsic evidence of invalidity is relied on. They must be held valid if upon their face the statutory power has been substantially complied with. In order to sustain the assessments, it must appear affirmatively that they have been made in substantial compliance with the authority given by the charter. *Hayes v. Douglas Co.* 92 Wis. 441, and cases cited. In that case it was said: "When it is required that the assessment shall be according to benefits accruing to each parcel, an assessment by the frontage rule does not show affirmatively a compliance with the statute. While such an assessment is not necessarily erroneous, it is presumed to be so unless the return shows that the board has considered that matter, and finds that the benefits are in the proportion of the frontage of each parcel."

The reports under consideration appear to fully satisfy the requirements of the rule thus stated, for they show that the assessment is according to the *benefits* secured to each lot or parcel, and must therefore necessarily be correct. The positive statements therein contained cannot be avoided by mere arguments or ingenious inferences. We do not think

that the final reports of these assessments show that they were made on the front-foot rule or according to the area, and the inference attempted to be drawn to that effect is not justified, we think, by the record. The reports show definite assessments for definite amounts upon certain specified lots for the amount of benefits accruing to such lots or parcels for such improvement. This averment is clear, direct, and certain, and there is nothing to furnish ground for any other inference. The language used shows that the amounts so assessed were apportioned upon and *according to benefits* accrued. It is enough, we think, that the return shows, by inclusive statement, that the action of the board was within the law. It was not necessary to go further, and show, by exclusive or negative averment, that no possible or probable cause of invalidity intervened, or that no other property was benefited by the improvement. The reports, preliminary and final, show that the board of public works did consider the matter of what property abutting on or adjacent to the streets in each case was or would be benefited by the improvement, and formed the taxing district accordingly, and as to each parcel or lot *the amount of such benefit.* This embraced the entire matter submitted to them, and, in the absence of evidence to the contrary, is conclusive that the assessments were upon the basis of benefits actually accruing, and not upon or by any rule or method that would produce any different result. In *O'Reilley v. Kingston*, 114 N. Y. 441, 448, where it appeared that the assessors "reached the conclusion that the tax should be apportioned among the owners of the real estate bordering upon the street, according to the number of feet front owned by each individual," the court said: "This is not necessarily an erroneous principle, if it was their judgment that each owner was benefited in that proportion. On the other hand, it may be the most just and equitable of any that could be adopted." *In re Cruger*, 84 N. Y. 619; *In re Eager*, 46 N. Y. 100.

In determining what lots or parcels of land abutting on or adjacent to the street were benefited, and the amount of such benefits in each instance, the board acted judicially, and upon actual view of the premises. Consequently their judgment on the question cannot be here reviewed, unless they acted upon an erroneous principle in making the assessment. It is enough if it is stated in their report or assessment that it was made upon the basis of benefits accruing as the law required, in which case it could not be wrong. The several assessments were for benefits accruing to each of the lots named in the report by reason of the improvement. The fact that in the report the board gave the frontage of the lots upon the street, or that they assessed upon each lot the exact cost of the improvement in front of the same, will not, of itself, vitiate the assessment. A report that the board had assessed the expense of the improvement according to the front foot, without finding that the special benefits were in that proportion, would not be in compliance with the law. Cooley, Taxation (1st ed.), 454. In *Springfield v. Sale*, 127 Ill. 360, 363, where the commissioners gave the frontage of the lots upon the street, and they assessed against each lot the exact cost of the improvement, it was held that that would not of itself vitiate the assessment, and the court said: "It would seem that the commissioners determined that the benefit to the lots was equal to the cost of the sewer in front of the same, and charged the amount thereof upon such lot. If so, it is impossible for us to say that the assessment was not fairly and impartially made for benefits accruing to said lots. What basis for ascertaining benefits shall be adopted by the commissioners is not prescribed by law." Nor does the charter in the present instance furnish any rule on the subject, other than that the assessment shall be according to the benefits accruing to the property. In *State v. Comm'rs of Streets & Sewers*, 38 N. J. Law, 195, it was held that an assessment for a street or

sewer, so apportioned on the lands that it happens to be coincident with the proportion of area of those lands, may, like an assessment on frontage, be according to the rule of benefits as established by law, and, if commissioners, acting under that rule, so find and assess property,—that is, if they, in assessing property specifically benefited under the proper rule for such assessments, find that the area or frontage of the assessable property corresponds with the benefits to such property,—it would be a proper assessment and sustainable, in the absence of evidence to show an error in judgment; and that the mere fact that an assessment laid on property peculiarly benefited in proportion to benefits, and limited thereto, corresponds with area or frontage, will not overturn such assessment.

Objection is taken to the proceedings forming the taxing districts, that they were limited to a locality not contemplated by the charter, in that the board of public works, as in the case of West Fifth street, where the board was ordered to view the property *fronting, abutting, and adjacent* to said street between certain points, unduly limited the extent of the district, in that the territory that might be benefited by the improvement might be greater and more extensive than the property fronting, abutting, or adjacent to the street between the points named. The board reported that they had viewed all such property,—that is to say, all property fronting, abutting, or adjacent to the street between the points named,—and reported a description thereof and a statement of benefits. It cannot be affirmed, as a matter of law, that, outside of the limits indicated, there was any property that was or would be benefited by the proposed improvement. The report of the board of public works on the subject must be held to be conclusive. If any such property there was, it could have been pointed out before the board, after notice given and upon the hearing, before the final report was confirmed. The meaning of the word ad-

jacent, as already pointed out, shows that it is a relative, and by no means a definite and absolute, term. We think that, under the flexible provisions of the charter already noticed, no practical difficulty can occur in the administration of these provisions. The point does not appear to have any practical relation or bearing upon the assessments in question for want of proper facts whereon to found it.

Objection is taken to the notice given of the review of the preliminary report and confirmation thereof, in that it was directed "to all the owners of real estate fronting, abutting, and adjacent" to the street in question, and it is said that it should have been directed to the owners of property which was to be benefited. These were *prima facie* the parties to whom it is said the notice was directed. The charter (sec. 124) does not require it or any notice required in the proceeding to have any particular address or direction; it is required only that notice to the effect provided be published, etc. If addressed to all whom it might concern, it would be sufficient under the law. We are unable to perceive any substantial or valid objection to either of these assessments, and, for the reasons stated, we hold they should have been sustained, and that the circuit court erred in setting them aside.

SEWER TAXES.

The plaintiff contends that the city charter of Superior conferred no authority on the common council to make any special assessments for sewer purposes, for the reason that the charter does not provide for giving the property owners who are to be taxed for the expense of constructing them any notice of the proceedings or any opportunity to appear for the purpose of being heard as to the amount to be charged against their property for such purposes; and the case of *Dietz v. Neenah*, 91 Wis. 422, is relied on. In that case it was held that the want of any provision for notice of the proceedings in making assessments for sewers ren-

dered the provisions of sec. 96 of the charter of the city of Neenah on the subject of sewers unconstitutional and void. An attempt was made, on the motion for rehearing in that case, to support the assessment under secs. 895–904, R. S. 1878, inclusive, in relation to villages, made applicable to cities by sec. 927, R. S. 1878, but it was held that the city, for the reasons there stated, took, by virtue of said sections, no power to make or levy assessments for sewer purposes. Referring to the previous case of *Meggett v. Eau Claire*, 81 Wis. 326, the court expressed a disinclination to extend the rule of that case as to what would constitute constructive notice, and stated that the rule had been carried quite as far in that case as it should be. It seems to be conceded that all the provisions of the city charter in relation to sewer assessments had been complied with, and the only question made concerning them is whether the provisions of the charter on the subject of such assessment were unconstitutional, under the ruling in *Dietz v. Neenah, supra.*

Prior to the levy of the sewer assessments, the city had been duly divided into sewerage districts, and a plan of sewerage had been adopted, as provided by sec. 147 of the charter, and the board of public works had caused diagrams thereof for each district to be prepared, as provided by sec. 148 of the charter, showing the sewers crossing the lots and parcels of land involved in this action, and notices had been given, as provided by sec. 149, by publication, and a hearing had been had and reports made to the council, and examinations made by them, as provided by sec. 150, and a final determination made therein, as provided, and filed in the city clerk's office, as specified in sec. 151. The court found that "all notices and orders required by the charter to be published or posted," relating to the proceedings dividing the city into sewerage districts, set forth in the findings, were duly and legally published; and "all proceedings relating to the taxes and assessments, except as contained and set

forth in the findings, were and are legal, valid, and sufficient, and no other evidence had been introduced to set aside said special taxes or assessments, except as set forth in the findings, and no objections have been urged against any of the proceedings relating to the special taxes or assessments, except as shown and contained in said findings."

The charter provisions bearing on the question (subch. VI, sec. 35, subd. 28) provide that the common council shall have authority by ordinance "to prescribe and regulate the location and construction of sewers for the city." It is provided by sec. 147 that the city should have full power to construct systems of sewerage, but should not enter upon such construction until it should have been divided into sewerage districts, and a plan should have been adopted in the manner specified in the charter, provided that it should not be necessary, before any part of the system was constructed, that the plan should be determined upon in all its details, but that it should be settled so far as relates to that portion of the system upon which the construction is commenced.

By sec. 148 the board of public works is required to cause diagrams of the plans of sewerage for each district to be prepared, showing the lots and parcels of land, the main sewers, minor sewers, manholes, catchbasins, and all other matters pertaining to the system. On the completion of such diagram, notice shall be given in the official paper of the city substantially as provided: "That a plan for a sewerage district, bounded as follows: ——, has been prepared and is now open for inspection at the office of the city clerk. All persons owning or interested in real estate in said district are entitled to examine the same at any time within twenty days after the first publication of this notice, and file objections to said plan. That on the —— day of —— this board will be in session to consider any objections that may have been filed, and all persons desiring to be heard

before the board can then be heard. Dated ——. Board of Public Works." The day for the hearing specified was required to be within ten days after the last publication of the notice, which is to be published at least once each week for two successive weeks. On the day specified the board was required to take up and consider all objections made to the plan as proposed, and to take down in writing any testimony that might be offered to sustain said objections; and, when it had concluded the hearing, they were to report the proposed plan, with all objections overruled, and the evidence taken thereon, to the common council. The council was then required to examine the same, and might approve the plan as proposed, or change it in such manner as they might think proper, and approve it as changed or modified by them, or might reject the plan, and direct the board to prepare a new one, in which case the same proceedings were required to be had as before.

By sec. 151 it is required that, when the plan of any sewerage district is finally determined, a complete diagram of the same is to be prepared and filed in the office of the city clerk. By sec. 152 the board is required to proceed "to construct the sewers determined upon, *when, and as ordered to do so* by the common council." After the common council shall have ordered the construction of any sewer, the board of public works is required to *advertise for and receive bids* for doing the work so ordered, having first procured to be carefully prepared and put on file in the office of the board, for the examination and guidance of bidders, plans and specifications describing the particular work to be done, the kinds and qualities of material to be used, and might let the contract to the lowest responsible and satisfactory bidder; provided, the board should have the right to reject any and all bids, and readvertise for proposals, if none of the bidders were satisfactory, or if they believed any agreement had been entered into between bidders to

prevent competition. By sec. 153 it was provided that the contract might, at the option of the city, except as otherwise provided, require the contractor to receive, as payment for so much of the work as had been assessed against the lots benefited, interest-bearing certificates against such lots, respectively, or improvement bonds, or the proceeds of such bonds; and the residue of such contract, if any, should be paid out of the proceeds of the general sewerage tax, to be levied on real estate and personal property within the sewerage districts by the common council on the recommendation of the board of public works, or, after this is exhausted, out of a portion of the proceeds arising from general city sewer bonds.

It was also provided, by sec. 154, that, after any contract for work under said chapter, to be paid for in whole or in part by such assessment, had been entered into, the board of public works should make, or cause to be made, an assessment in proportion to benefits *against all lots, parts of lots, and parcels of land benefited* by the sewer so contracted to be built, "at the *average rate* of $2.50 per lineal foot for its *whole* length;" and by sec. 170, whenever a contract shall have been let for the construction of any sewer, and the amounts have been determined that are chargeable to the lots or parcels of land benefited by said sewer, if the common council deemed it for the best interests of the property owners affected by the special assessment for the construction of said sewer, they *might cause a notice* to be published in the official paper of the city once in each week for two successive weeks, substantially in the following form: "Notice is hereby given that a contract has been let for the construction of a sewer as follows: (describe the street or alley) that a statement showing the amount of the special assessment chargeable to the lots and parcels of real estate benefited by said sewer is now on file with the city clerk;" and then notifies the owner to pay or bonds will be issued.

By sec. 173 it is provided that in each year after the issuing of said bonds until all of them are paid, when the tax roll for the year is prepared, sufficient of the special assessment on each parcel of land covered by said bonds to pay the annual instalment of principal, with six per cent. interest on the amount of the said special assessment then unpaid, "*shall be extended on the tax roll as a special tax* on said property, and thereafter this tax shall be treated in all respects *as any other city taxes*, and, when collected, the same shall be credited to the proper fund."

It is provided by sec. 35, subch. VI, of the charter, that the common council shall have full power and authority to make all rules, by-laws, and regulations for the carrying into effect the powers vested in such council as they shall deem expedient; and by sec. 59 of the charter it is made the duty of the board of public works, under the direction of the common council, to superintend all public works. Sec. 37 provides that all *laws, ordinances, regulations*, and by-laws shall be published, and sec. 29 requires the designation of a newspaper for publication of the same. It is provided by sec. 60 of the charter that the board of public works shall, at each regular meeting of the common council, make a brief and concise report of their doings up to the time of such meeting, and the council may take such action on the same as they may think proper. If no action is taken by the council within thirty days, the report *shall be deemed confirmed.*

It will be seen, therefore, that by the charter provisions are made for ample notice to property owners of the proceedings for sewer assessments. They are notified to appear and file objections to the plan prepared for the sewerage districts, showing the lots and parcels of land, etc. The board having reported the proposed plan to the council, that body then approves, modifies, or rejects the same. Its action thereon, and in ordering the construction of sewers, is published; plans and specifications for the work are then filed;

and the board of public works, by sec. 152, is required to advertise for bids to do the work; and, when the contract has been let, notice thereof is or may be published, as provided in sec. 170, giving the owner an opportunity to pay the assessment or have bonds issued on the property. The resolution for issuing the bonds is also published as a part of the proceedings of the council, and the assessment is placed on the tax roll and collected when and as the taxpayer is required to pay his general taxes. He is charged by law with notice of the fact of the time when his general taxes become due and payable. If the taxes thus assessed are returned as delinquent, there is a public notice of sale of the premises by the county treasurer, and, if sold for nonpayment of taxes, a notice of redemption from such sale is required to be published. If the land is occupied, notice of application for a tax deed is required to be given to the occupant.

Jurisdiction is undoubtedly essential before the plaintiff's property can be assessed, but it is obtained, for the purpose of such assessments, as soon as the plan of sewers is completed and filed, and districts are established, including the plaintiff's property, and notice given to him of that fact, as provided by the sections of the charter cited. Every person, whether a resident or nonresident, who owns land situated in this state, knows that it is subject to taxation and sale for the nonpayment of taxes annually assessed thereon, and is presumed to know the time prescribed by law for the sale thereof, and for its redemption for nonpayment. It seems that such notice as the law furnishes is in general the only notice given, and all the notice that is required; and if the legislature provides for notice to and hearing of the proprietor at some stage of the proceeding, as to what proportion of the tax shall be assessed on his land, it cannot be said that the levying of the tax or assessment is a taking of his property without due process of law. By sec. 107 of the

charter, the treasurer is required, on receipt of the tax roll, to "give one week's notice thereof in the official paper," and such notice shall specify that "the taxes shall be paid before the last Monday of January following;" and by sec. 105 power is denied to the common council to remit or cancel any tax, except in certain specified cases. Such assessments are to be carried out on the tax roll in a separate column or columns, opposite the lots or tracts upon which the same may be a lien, and the treasurer has the same authority with reference thereto as if the amount of such lien was a general tax.

The question recurs whether the provisions of the city charter referred to, and which were complied with in the present case, constituted such constructive notice of the proceedings in question as to satisfy and comply with the rule stated in *Dietz v. Neenah*, 91 Wis. 422. We think the tax proceedings in question, as thus provided for, must be regarded as due process of law, within the principles sanctioned by a decided preponderance of judicial authority, and maintained by the decisions of the supreme court of the United States, and as pointed out in *Meggett v. Eau Claire*, 81 Wis. 326. In this case the language of Mr. Justice TAYLOR, in *Warner v. Knox*, 50 Wis. 429, was quoted with approval, to the effect that "the manner of making street improvements in cities, and of collecting the assessments necessary to pay for such improvements, and the property which shall be charged with the cost thereof, is mainly a matter for the consideration of the legislature, and it would require a very strong showing of injustice and wrong to justify this court in setting aside the action of the legislature upon a subject of that nature."

The doctrine maintained and enforced by the supreme court of the United States is, in substance, that the constitutional requirement of due process of law, as applied to assessments and taxation, is not infringed by a state law au-

thorizing the imposition of a tax or assessment upon property according to its value, "if the owner has an opportunity to question the validity of the amount of it, either before that amount is determined or in subsequent proceedings for its collection." *Hagar v. Reclamation Dist.* 111 U. S. 701. Mr. Justice FIELD, in behalf of the court, on pages 708–710, said: "But, where the taking of property is the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. . . . Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes, . . . and, generally, specific taxes on things, or persons, or occupations. In such cases, the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. . . . So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing."

In *Spencer v. Merchant*, 125 U. S. 345, it was held, in substance, that where the statute of a state, under which a

street assessment is made, "provides for notice to and hearing of each owner at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law," within the meaning of the constitution. To the same effect are *Kentucky Railroad Tax Cases*, 115 U. S. 331, where it was said: "It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial; and that 'due process of law,' as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by *statute* is generally the only notice given, and that has been held sufficient. 'In judging what is "due process of law,"' said Mr. Justice BRADLEY in *Davidson v. New Orleans*, 96 U. S. 97, 107, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law."' In its application to proceedings for the levy and collection of taxes, it was said in *McMillen v. Anderson*, 95 U. S. 37, 42, that it 'is not, and never has been, considered necessary to the validity of a tax' 'that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed.' . . . But in *State Railroad Tax Cases*, 92 U. S. 575, where the assessment of the taxable value of railroads by a board was challenged for the reason that the proceeding was not 'due process of law' for want of notice and hearing, it was said by Mr. Justice MILLER, delivering the opinion of the court: 'This board has its time of sitting fixed by law. Its

sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and *in the business of assessing taxes, this is all that can be reasonably asked.*' "

These remarks are particularly pertinent to the proceedings of the board of public works, and of the common council, in making the assessments in question. In *Davidson v. New Orleans*, 96 U. S. 97, it was held that due process of law does not in all cases require resort to a court of justice to assert the rights of the public against the individual, or to impose burdens upon his property for the public use. In *Paulsen v. Portland*, 149 U. S. 30–37, where the question was the one of notice to the taxpayer, the court said: "While not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon an individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should *in terms be expressed either the necessity for, or the time or manner of, notice.* The city is a miniature state; the council is its legislature; the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for, when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus, in the case of *Gilmore v. Hentig*, 33 Kan. 156, it was held that: 'Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, . . . such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving

the same.'" *Cleveland v. Tripp*, 13 R. I. 50; *Allen v. Charlestown*, 111 Mass. 123. And notice by publication is a sufficient notice in proceedings of this nature. *Lent v. Tillson*, 140 U. S. 316–328.

It is beyond dispute that the sewer districts were lawfully created, and diagrams adopted after notice to all parties interested, and that a complete diagram was prepared and filed in the office of the city clerk. The common council ordered the construction of these sewers, and advertised and received bids for doing the work so ordered; and, after having put on file in the office of the board of public works plans and specifications for the same, said board made, or caused to be made, the assessments in question; and that this board might, in its discretion, give the notice required by sec. 170. It had the power to give it. In *Davidson v. New Orleans*, 96 U. S. 97, it was said: "Whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." And in *Spencer v. Merchant*, 125 U. S. 345, it was held: "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of land benefited thereby, and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. If the legislature provides for notice to and hearing of each

proprietor at *some* stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *McMillen v. Anderson*, 95 U. S. 37.

The several official acts and proceedings authorized by the charter, when taken together, must, we think, be regarded as providing for due process of law in the present case within the principles sanctioned by the decisions referred to, and, as held in *Meggett v. Eau Claire*, 81 Wis. 334: "As against the plaintiff, who is here invoking equitable relief, the city officers must be presumed to have performed their respective duties except in so far as the contrary has been alleged or shown." The finding of the court sufficiently shows that they have properly executed their authority. There is no specific objection made to the contrary, and we hold, therefore, that, by compliance with the provisions of the charter above referred to, such constructive notice was given as to render valid the sewer assessment proceedings in question.

SIDEWALK TAXES.

The judgment of the circuit court set aside a sidewalk tax for $131.11. The finding upon this subject is that the only proceeding taken by the city of Superior for the building of said sidewalks was a notice to the contractors for bids for doing the work; that no notice was ever given to the plaintiff requiring him to do the work of constructing the walk, and no notice whatever was ever given to him that his property was liable to bear the expense of the sidewalks until after the same were constructed and the amount of the cost thereof extended on the tax roll.

Subch. XIV of the city charter makes provision for sidewalks in substance that they shall be laid to the established grade of the street; that the common council may, by resolution, establish the width, determine the material, and prescribe the method of construction of sidewalks. The charter (sec.

145) provides that the construction of sidewalks shall be done at the expense of the owners of the lots or lands benefited, as therein provided; that it shall be the duty of the board of public works to cause a standard sidewalk to be laid in front of such lots or parcels of land. Such work is to be let by contract in all cases where the estimated cost shall exceed $100, and in all other cases it may be done without the intervention of any contract; and, in all cases where the sidewalk shall be out of repair for more than three days, it shall be the duty of the board of public works to repair the same. The board of public works is to keep an account of the expenses of laying and repairing sidewalks, whether the work be done by contract or without the intervention of a contract, and report the same to the city comptroller, who shall annually prepare a statement of the expenses so incurred chargeable to each lot or parcel of land benefited, and report the same to the city clerk, and the amounts therein charged shall be by the city clerk entered in the tax roll as a special tax against said lot, subdivision, or parcel of land, and the same shall be collected in all respects like other city taxes upon real estate.

No other notice of the assessments for sidewalks than is there provided seems to be either necessary or beneficial. *Hagar v. Reclamation Dist.* 111 U. S. 708–711. There can be no sale of the property of a citizen until he has had ample time to make application for all appropriate remedy; nor, if sold, can it be conveyed until after a very considerable period within which it may be redeemed. Taxpayers cannot ignore the regular recurring annual periods of taxation and the operations of our taxing system. While property has its rights, it owes important duties as well, and which the owner should not be allowed to ignore.

The plaintiff appeals to a court of equity without any allegation of want of knowledge, notice, or information in regard to these proceedings against his property to subject

it to its just and proper public burdens; and, while the improvements have doubtless greatly benefited his property, he seeks to set aside the assessments made to pay for them, and cast the loss that will then ensue upon those who have contributed of their labor and means to make them and improve his estate. Public policy requires that the rule granting relief in equity in such cases be held with some degree of strictness. The considerations to which we have adverted suggest that the rule in *Meggett v. Eau Claire*, 81 Wis. 334, as to what should be regarded as constructive notice in cases like the present, should be adhered to instead of being restricted.

It follows from these views that the parts of said judgment relating to the tax certificates issued upon the tax sales of 1893 and 1894 by the county treasurer of *Douglas* county, as well as the deductions directed to be made therefrom, be affirmed; and that the parts of the said judgment setting aside the paving, the sewer, and the sidewalk taxes mentioned therein be reversed, with costs of this appeal; and that this cause be remanded to the circuit court, with directions to enter judgment in relation to the said paving, sewer, and sidewalk taxes, in accordance with the opinion of this court.

By the Court.—Judgment is ordered accordingly.

PELLARDIS, Respondent, vs. THE JOURNAL PRINTING COMPANY, Appellant.

January 12 — April 12, 1898.

Evidence: Libel: Damages.

1. In an action for the publication of a libel in a newspaper, an article on the editorial page of such paper stating the extent of its circulation is admissible in evidence, as bearing upon the question of the damages caused by such publication.

2. Where the answer in such action admitted that the libelous article referred to the plaintiff, though by an erroneous name, it was not error to charge the jury that while such article referred to the plaintiff, the error in the names would have a bearing upon the question of its publicity and consequently of the amount of the damages.
3. In an action for libel, actual damages cannot be reduced by proof of mitigating circumstances, and the admission of evidence of such circumstances is therefore erroneous.
4. A verdict of $450 damages, in an action for a libel published in a newspaper having a large circulation, charging the plaintiff with the crime of counterfeiting, *held* not excessive.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The facts in the case are stated in the opinion.

For the appellant there was a brief by *Kellogg & Durley*, attorneys, and *Kitchel, Cohen & Shaw*, of counsel, and oral argument by *Emanuel Cohen*. They argued, *inter alia*, that it was error to admit as evidence of the circulation of the paper on the day when the libel was published the statement of its circulation on a different day. The extent of its circulation was important upon the question of actual damages, and should have been proved by competent evidence. Sutherland, Dam. § 1207; *Bigelow v. Sprague*, 140 Mass. 425; *Fry v. Bennett*, 28 N. Y. 324; *Gathercole v. Miall*, 15 Mees. & W. 319; *Comm. v. Blanding*, 3 Pick. 304, 311. There was no damage to the plaintiff because there was no evidence that any person understood the words to refer to her. Bishop, Non-Cont. Law, § 277; *Wilson v. Noonan*, 27 Wis. 598; *Delaney v. Kaetel*, 81 id. 353; 13 Am. & Eng. Ency. of Law, 393; *De Witt v. Wright*, 57 Cal. 576. The words on their face were clearly not published of the plaintiff, and their import was therefore for the jury. *Carlson v. Minn. Tribune Co.* 47 Minn. 337; *Dressell v. Shipman*, 57 id. 23; *Palmer v. Bennett*, 83 Hun, 220; *Hanson v. Globe Newspaper Co.* 159 Mass. 293. Under our statute a defend-

ant may plead and prove mitigating circumstances to reduce the damages. This rule is not limited to punitory damages. *Maxwell v. Kennedy*, 50 Wis. 645. The condition and character of the plaintiff are circumstances which should affect the damages. *Larned v. Buffinton*, 3 Mass. 546; *Sayre v. Sayre*, 25 N. J. Law, 235; *Bush v. Prosser*, 11 N. Y. 347; *Wachter v. Quenzer*, 29 id. 547.

For the respondent there was a brief by *Crownhart & Foley*, and oral argument by *W. R. Foley*.

The following opinion was filed February 8, 1898:

CASSODAY, C. J. This action was brought to recover damages sustained by the publication of an alleged libel, of which the following is a copy: "West Superior, Wis., June 21. (Times Special.) John Paradis, a fourteen year old boy, was drowned while bathing in the Bay of Superior this afternoon. He was seized with cramps in deep water. *His mother*, now living here, was recently released from the federal prison at Madison, having served a term for counterfeiting." It appears from the allegations of the complaint, and the innuendoes therein contained, that the plaintiff is the mother therein mentioned, and that the article was so published of and concerning her.

The answer admits the defendant is a corporation; that June 22, 1896, it published the Minneapolis Times; that it published such article on that day in that paper; that the plaintiff is the mother of Joseph Pellardis, who was drowned June 21, 1896; that the agents of the defendant in writing the article, and the defendant in publishing the same, attempted to report the drowning of said Joseph Pellardis, but failed to do so. The answer further denies all malice, and alleges good faith; and by way of justification alleges, in effect, that prior to November 14, 1894, one Frank Turgeon was engaged in counterfeiting the lawful money of the United States, in violation of the federal statutes; that dur-

ing the time he had a room in the house occupied by the plaintiff and her family and boarded with them; that the plaintiff had full knowledge of such crime, and willingly connived at, aided, assisted in, and permitted the commission of the crime by Turgeon; that November 14, 1894, criminal warrants were duly issued for the arrest and examination of the plaintiff and Turgeon, charged with the crime of counterfeiting; that thereupon they were arrested, and, after examination, the plaintiff and Turgeon were held to trial, and committed to the county jail for want of bail; that January 29, 1895, three indictments thereon against the plaintiff were returned by the United States grand jury; that two other indictments thereon were duly returned against the plaintiff and Turgeon jointly; that Turgeon pleaded guilty to the charges against him, and was sentenced by the court to five years' imprisonment in the state prison at Waupun; that in default of bail the plaintiff was held in custody under said charge, waiting trial, for twelve and one-half months, when she was discharged without trial, upon motion of the United States district attorney; that she was finally released from custody upon dismissal of the proceedings against her, upon the consideration of sympathy for her and her dependent children and her ill health, and not because of doubt on the part of the district attorney as to her guilt of the crime with which she was charged. The defendant, further answering, and in mitigation of damages, alleges substantially the same facts. The answer further denies each and every allegation, matter, and thing in said complaint contained, not therein admitted.

At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed her damages at $450. From the judgment entered thereon the defendant brings this appeal.

1. The article published was libelous *per se*. The extent of damages sustained by the plaintiff depended, in a meas-

ure, upon the extent of the circulation of the paper containing the libel. That paper contained a statement upon the editorial page that its circulation for that day was 20,330, and averaged 21,000 to 24,000 for the month. We perceive no error in allowing that statement to be read in evidence, as bearing upon the question of actual damages.

2. Several errors are assigned by reason of the published article referring to "John Paradis," as the boy who was drowned, instead of "Joseph Pellardis;" but, as indicated, the answer expressly admits that the "plaintiff is the mother of Joseph Pellardis, who was drowned" on the day named; and that the defendant, in writing and publishing the article, "attempted to report the drowning of said Joseph Pellardis, but failed to do so." In other words, the answer admits that the defendant wrote and published the article of and concerning the plaintiff,— the mother of the boy who was so drowned. Among such errors, based upon such difference in names, was a portion of the charge to the jury, as follows: "Plaintiff's family name is Pellardis. The publication mentioned her by the name of Paradis, and speaks of the boy as John, whereas his name was Joseph. That simply, gentlemen, is, there is not any question but plaintiff was referred to here, but the error in the names your attention is called to as bearing upon the question of the publicity; that is, the degree to which the publication pointed to the plaintiff, as bearing upon the question of the amount of damages." In view of the admission in the answer mentioned, we perceive no error in charging the jury to the effect that there was no question but that the plaintiff was referred to in the article. The court was only concerned with the meaning of the article as applied to the plaintiff. *Hanson v. Globe Newspaper Co.* 159 Mass. 295, 296. True, the difference in names might induce readers of the article to think that some one other than the plaintiff was referred to, and to that extent was favorable to the defendant, but

to that extent the jury were instructed that they might consider it "as bearing upon the question of the amount of damages." It follows that under the pleadings there was no ambiguity in the words published which required that their meaning should be submitted to the jury. What is said sufficiently disposes of the other errors based upon such difference of names.

3. There is another feature of the case, which obviates several errors assigned. On the trial the plaintiff disclaimed any punitory damages, and the court ordered such disclaimer of any claim for punitory damages to be placed upon record. Upon that point the court charged the jury: "Coming to the question of damages, you will give the plaintiff such sum as will fairly compensate her for the injury the publication has proximately done to her reputation so far as it is untrue; also such sum as will fairly compensate her for the injury to her feelings proximately caused by the publication, so far as it is untrue. You will give *nothing* further in way of *exemplary damages;* nothing in the way of punishment of the defendant, or as warning to it or other papers; and in passing upon the question of damages you will, of course, carefully consider all the circumstances of the case, so far as they have been revealed by the evidence given in court." This confined the plaintiff's recovery to actual damages. This court has recently held that such damages cannot be reduced by the defendant's alleging and proving mitigating circumstances. *Candrian v. Miller*, 98 Wis. 164. The libelous article stated that the plaintiff had been "recently released from the federal prison at Madison, *having served a term for counterfeiting.*" The answer does not attempt to justify this charge, and what it alleges about her arrest, indictment, and being committed to jail for want of bail, and finally discharged, without trial and upon the sole ground of sympathy, could only have the effect of mitigating the damages. Upon this state of the record, and under the rul-

ing of this court in the case cited, the plaintiff was entitled to a verdict for actual damages; and such damages could not be reduced by any mitigating circumstances. There was no error, therefore, in charging the jury that, in "so far as the publication implies that she [the plaintiff] had been convicted and punished for counterfeiting, it is defamatory and libelous, and she is entitled to a verdict in her favor." To justify the truth of the charge in such a case, the allegations of the answer and the proof must be as broad as the charge against the plaintiff. *Burford v. Wible*, 32 Pa. St. 95; *Swann v. Rary*, 3 Blackf. 298; *Buckner v. Spaulding*, 127 Ind. 229. True, where several distinct things are charged in the libel, the defendant may justify as to one, although he fails as to the others; but as to that one, the justification must be full. *Fero v. Ruscoe*, 4 N. Y. 162; *Holmes v. Jones*, 121 N. Y. 461; *Lanpher v. Clark*, 149 N. Y. 472. But here there was only one thing charged in the libel, as indicated.

It follows from what has been said that what is pleaded and proved and attempted to be proved in respect to the arrest, indictments, and the committing of the plaintiff to jail for want of bail, and her criminality and complicity with Turgeon in counterfeiting, could only be available to the defendant in mitigating the damages. But, as indicated, since the plaintiff, under the charge, could only recover actual damages, and since such damages could not be reduced by mitigating circumstances, it follows that, in so far as such testimony was admitted, it was prejudicial to the plaintiff; and there was no error in excluding any of it. Whether it was error to charge the jury to the effect that counterfeiting and the passing of counterfeit money are distinct crimes, or whether the latter may be included in the former, it is not necessary here to decide, for the reasons stated. It is true, the case does not seem to have been tried with reference to the law as held in *Candrian v. Miller*, 98 Wis. 164, otherwise the charge might, in some respects, have been different.

5. We cannot say that the damages are excessive.

What has been said, it is believed, covers, in effect, all the errors assigned, although they have not all been specifically considered; in fact, they are so numerous and of such a character as not to require specific consideration. We find no reversible error in the record.

By the Court.—The judgment of the superior court of Douglas county is affirmed.

BARDEEN, J., took no part.

A motion for a rehearing was denied April 12, 1898.

DAHLMAN, Respondent, vs. GREENWOOD, Assignee, imp., Appellant.

January 17—April 12, 1898.

Voluntary assignment: Garnishment.

1. A debtor gave a chattel mortgage of nearly all his property to several creditors, with an oral understanding that one of them should take the property into possession and convert it into money for the benefit of all. *Held*, that such chattel mortgage was in effect a voluntary assignment for the benefit of creditors, and, not being executed in the manner provided by law, is void as to the other creditors.
2. Property transferred under a conveyance which is void as to creditors is subject to garnishment under sec. 2768, R. S. 1878, even though the property should be seized under attachment or execution. Sec. 2753, R. S. 1878, should be construed as referring to property which is not in the hands of persons claiming title or ownership thereof. *Holton v. Burton*, 78 Wis. 321, distinguished.
3. The rights acquired by a garnishment of one holding property under a conveyance void as to creditors are not affected by a voluntary assignment made eight days afterward.
4. Where one creditor has garnished the holder of property of the debtor under a conveyance void as to creditors, and also two insurance companies against whom the debtor had claims, the other creditors whose garnishments did not affect the latter claims might properly be subrogated to the rights of the first creditor in case he was paid out of the other property.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

This is an action of garnishment. On the 15th of October, 1896, William Schneider and George Schneider were copartners in the mercantile business at Lake Mills, Wisconsin. Upon that day George Schneider executed a chattel mortgage, in the name of the firm, upon the stock in trade and book accounts of the firm, to four creditors of the firm; the understanding being that Greenwood's State Bank, one of said creditors, should take possession of the property, converting the same into money for the benefit of all the mortgagees. The firm had no other property, except claims against two insurance companies for $500 each, resulting from a fire which had occurred some time before. The bank immediately took possession of the mortgaged property and the books of the firm. Schneider Bros. were insolvent when the mortgage was given. Upon the following day the plaintiff, who was a creditor of the firm in an amount of over $500, commenced action upon his claim against Schneider Bros., and garnished the mortgagees, and also garnished the insurance companies above referred to. Other garnishment suits followed on behalf of other creditors, but the insurance companies were not again garnished.

On the 23d of October the firm executed a voluntary assignment, under the statute, to the defendant *Greenwood*, who duly qualified; and upon the following day, upon petition of the assignee, and upon notice to the mortgagees and garnishing creditors, the circuit court ordered the mortgagees to turn over to the assignee the property in their possession under the mortgage, without prejudice to the rights and interests of any of the parties, and that the assignee convert the same into money, and hold the same subject to any rights of the several parties which might thereafter be established in the garnishment suits. The assignee subsequently realized from the sale of the merchandise, clear,

$2,250, and had collected from the book accounts $400 at the time of the trial of this action. Subsequently, *Greenwood*, as assignee, was interpleaded as a defendant in the garnishee actions, and the action was tried by the court upon stipulated facts and certain additional testimony; a motion on the part of the principal defendants to dismiss the garnishment action as an abuse of process being heard and decided at the same time.

The court held, in substance, that the chattel mortgage was in effect a voluntary assignment, and void as to the plaintiff, and that it was void as to all other creditors by reason of the subsequent assignment of Schneider Bros., and that the assignee, *Greenwood*, stood liable to the plaintiff, in lieu of the garnishees, to the extent of all the merchandise, book accounts, and claims against insurance companies, which had come into his possession as assignee. The judgment also directed that *Greenwood* pay to the plaintiff, out of any funds in his hands derived from the insurance claims, or, if such funds were insufficient, then out of such funds in his hands derived from the merchandise and accounts, the sum of $556.01 and interest; being the amount of the plaintiff's judgment against Schneider Bros., as well as the costs in the garnishment action. The judgment further provided for the marshaling of the firm assets in the hands of the assignee, and for the payment of subsequent garnishing creditors as their rights should appear in the several garnishment actions. The judgment also provided that said subsequent garnishing creditors be subrogated to the plaintiff's rights against the insurance companies in case the plaintiff's judgment should be paid out of the mortgaged merchandise and accounts; also, that the assignee proceed to collect the accounts and insurance claims, and hold the proceeds subject to further equitable distribution in the other garnishment actions.

From this judgment the assignee appeals.

R. M. Bashford, for the appellant, contended, *inter alia*, that the garnishment proceeding was an abuse of process because the property was subject to attachment or execution. *German Am. Bank v. Butler-Mueller Co.* 87 Wis. 467; *Steen v. Norton*, 45 id. 412; *Wickham v. South Shore L. Co.* 89 id. 23; *Chanute v. Martin*, 25 Ill. 63; *Corbin v. Goddard*, 94 Ind. 419; *Norton v. Kearney*, 10 Wis. 443; *Page v. Smith*, 24 id. 368; *Fuller & F. Co. v. McHenry*, 83 id. 573; *Northern Nat. Bank v. Weed*, 86 id. 212; *McCown v. Russell*, 84 id. 122. The rights of the garnishing creditors were dissolved by the voluntary assignment. *Holton v. Burton*, 78 Wis. 321; *Sexton v. Mann*, 15 id. 162; *Wolf v. McKinley*, 65 Minn. 156; *Ives v. Addison*, 39 Kan. 172; *White v. Coleman*, 130 Mass. 316; 8 Am. & Eng. Ency. of Law, 1179.

For the respondent there was a brief by *Rietbrock & Halsey* and *Stark & Hansen*, and oral argument by *L. W. Halsey*.

The following opinion was filed February 8, 1898:

WINSLOW, J. Schneider Bros. gave a chattel mortgage upon their stock of goods and book accounts to several creditors, with the oral understanding that one of such creditors (i. e. Greenwood's Bank) should take possession of the property, and convert it into money for the benefit of all the mortgagees. The mortgage covered all the firm property save two claims of $500 each against certain insurance companies, and the bank immediately took possession of the mortgaged property. This transaction unquestionably constituted a voluntary assignment for the benefit of creditors, which, not being executed in the manner provided by the statute, was void as to the other creditors of the firm. *Winner v. Hoyt*, 66 Wis. 227. The fact that the mortgage did not cover all of the property of the firm does not affect the legal consequence. *Maxwell v. Simonton*, 81 Wis. 635; *Jameson v. Maxcy*, 91 Wis. 563. The plaintiff was a creditor of Schneider Bros. at the time the mortgage was given, and

garnished the bank while the stock of goods was still in its possession under the mortgage, and upon the same day garnished both the insurance companies. A few days later, Schneider Bros. made a voluntary assignment, under the statute, of all of their property, to the defendant *Greenwood*, who duly qualified and assumed the duties of his trust, and took possession of the mortgaged property under an order of court, and proceeded to convert the same into money; such action, however, being without prejudice to the rights of the mortgagees and garnishing creditors. The right of the plaintiff to claim any advantage over other creditors by reason of his garnishment is challenged upon two principal grounds, and these grounds will be considered.

1. It is said that, if the mortgage was fraudulent as to creditors, then the mortgaged property was liable to seizure upon writ of attachment or execution, and, hence, that it was an abuse of process to commence garnishment proceedings, because there was property, liable to execution, sufficient to satisfy the plaintiff's demand. R. S. 1878, sec. 2753. It is true that garnishment process will be set aside if it is shown that the defendant had property, liable to execution, sufficient to satisfy the plaintiff's demand. *German American Bank v. Butler-Mueller Co.* 87 Wis. 467. But it is also true that the statute (R. S. 1878, sec. 2768) provides that any property held by the garnishee under a conveyance void as to the defendant's creditors shall be embraced in the garnishee's liability. Under this provision it has been the custom to attack such transfers as the one before us by garnishment proceedings, as numerous cases in this court will show, and we are not aware that the right to do so has been questioned until now. While it is undoubtedly true that the mortgaged property might be seized by the officer under a writ of attachment or execution, and the question of *bona fides* afterwards tested in a replevin action, it also seems undeniable that the legislature, by enacting the provision last

cited, in sec. 2768, clearly intended to allow the question to be tested in garnishment proceedings. Such certainly has been the understanding of the bar and of the courts, and much may be said in favor of this method. It is far more orderly, less arbitrary, and involves no violence, nor the use of a strong hand. The two provisions must be construed together and harmonized, if possible. This may be readily done by construing that part of sec. 2753, R. S. 1878, which provides that the affidavit of garnishment must state that the defendant has not property liable to execution sufficient to satisfy the plaintiff's demand, to mean property which is not in the possession of third persons claiming title or ownership thereof. This, we think, is a reasonable construction, and harmonizes the two sections, and disposes of this contention.

2. It is claimed that the garnishment proceedings created no lien upon the mortgaged property, and, hence, that the subsequent voluntary assignment of Schneider Bros. conveyed the property to the assignee. The statute provides (ch. 349, Laws of 1883, as amended by ch. 451, Laws of 1887) that a voluntary assignment shall, under certain specified circumstances, avoid a large class of sales, mortgages, and other transfers of property made within sixty days prior to the assignment, but it does not provide that garnishments shall be thereby defeated. The argument is, however, that unless there was a specific lien, created by the garnishment, on the property, then it passed by the assignment, and, by operation of law, defeated the garnishment. In this connection it is argued that the proceeding by garnishment is analogous to proceedings supplementary to execution, and reliance is placed upon the decision in the case of *Holton v. Burton*, 78 Wis. 321. In the last-named case, supplementary proceedings were commenced against Burton before a court commissioner, and an injunction granted, which did not, however, enjoin him from making a voluntary assignment.

Burton thereupon made a voluntary assignment of his property under the statute. After the assignment the court commissioner appointed a receiver in the supplementary proceedings, and upon application the circuit court vacated the order appointing a receiver. Upon appeal this court affirmed this order, holding that, under the law and rules of court then in force, the making of a voluntary assignment after the commencement of supplementary proceedings, but prior to the appointment of a receiver and to the acquiring of any specific lien upon the property, was intended to supersede, and in fact did supersede, the supplementary proceedings.

Admitting the analogies which exist between supplementary proceedings and garnishment, it is not difficult to see the very obvious differences between the *Burton Case* and the one now before us. In that case no property had been found in the hands of any one who was before the court. The proceedings had been commenced, and the defendant had been enjoined from disposing of property, which injunction, however, did not, under the law and rule of court, prevent him from making an effective voluntary assignment, under the statute, of all his property. Not only had no property been reached, but no party had been reached who had any property of the defendant in his hands. In the present case, however, prior to the assignment a party had been served with garnishment process, who had in his hands more than $2,000 worth of property, under a conveyance void as to the plaintiff. The moment that process was served, the law had stepped in, and declared that from that time the garnishee should "stand liable to the plaintiff" to the amount of such property, unless exempt, or at least to an amount sufficient to satisfy the judgment obtained by the plaintiff in the main action. While that right or liability may not amount to a lien on the specific property held by the garnishee, the law nowhere expressly or impliedly provides that it shall be divested by a subsequent garnish-

ment process. The garnishee becomes a trustee of the property for the benefit of the plaintiff, and is so denominated in some jurisdictions, and the plaintiff acquires a specific right to have it held to satisfy his claim. Rood, Garnishment, §§ 193, 194. Our conclusion is that the rights acquired by the garnishment were not affected by the subsequent assignment.

It is contended that the garnishment process did not reach or affect the book accounts which had been covered by the terms of the chattel mortgage. The question is one of some difficulty, and upon which the authorities are in some confusion. Rood, Garnishment, § 167, and authorities cited. We find it unnecessary, however, to decide the point in this case, as the merchandise in the hands of the garnishee amounted to far more than the plaintiff's entire judgment, and as to this property there is no question of the plaintiff's right. The question of the liability of the garnishee for the proceeds of the book accounts cannot affect the plaintiff.

We perceive no error in the judgment upon the question of marshaling of assets and subrogation. The plaintiff had garnished both the chattel mortgagees and the insurance companies. The subsequent garnishments were only directed against the chattel mortgagees, and not against the insurance companies. The plaintiff therefore had acquired the right to depend upon two separate funds, while the other creditors had only the right to look to one of the funds. We see no objection to the application of the equitable rule that where one creditor can resort to two funds which are the property of the same person, and other creditors can resort to one of the funds only, the former must first seek satisfaction out of the fund which the latter cannot touch. *C. Gotzian & Co. v. Shakman*, 89 Wis. 52. This result is practically accomplished by the judgment in the present case.

If ultimately the claims against the insurance companies are collected (which seems to be a matter of some doubt), the

money will pass into the hands of the assignee, and the subsequently garnishing creditors will be subrogated to the right of the plaintiff against such moneys. Thus, practically, the plaintiff will have been paid out of the fund to which he alone had the right to resort, and the other creditors will receive the full benefit of the fund in which all had an interest. On the other hand, if nothing is collected of the insurance companies, then the question drops out of the case, because there were not in fact two funds, and the plaintiff's prior right to satisfaction out of the mortgaged goods is unquestioned.

No other questions require attention.

By the Court.—Judgment affirmed.

BARDEEN, J., took no part.

A motion for a rehearing was denied April 12, 1898.

---

99 171
99 441

THE CHARLES BAUMBACH COMPANY, Respondent, vs. LAUBE, imp., Appellant.

January 18 — April 12, 1898.

Mechanic's lien: Pleading: Conditions precedent: Amendment: Notice of claim.

1. Performance of conditions precedent must be pleaded, and when performance of one condition is required and the circumstances are such as to require performance of another in lieu of it, not alleged, evidence to support such required performance, if objected to, should be rejected and the complaint dismissed unless amended so as to cure the defect; though if the evidence be received without objection, the complaint may be so amended on the trial, or the defect ignored on appeal, if raised there for the first time.

2. Under sec. 3315, R. S. 1878, relating to subcontractors' liens, notice in writing of the claim for a lien must be served on the owner or his agent within sixty days of the performance of the last work or furnishing of the last material, or upon the agent of the owner

if to be found in the county; otherwise, the notice may be filed in the office of the clerk of the circuit court for the county, and if service of notice be alleged, the action cannot be sustained against objection, by proof that it was filed and that the circumstances existed making such filing effectual to preserve the lien. [Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Green county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

Action to enforce a subcontractor's lien. The complaint was in the usual form and stated, among other things, by appropriate allegations, that on and between October 18, 1895, and January 16, 1896, plaintiff sold and delivered to Jacob Steinman, as principal contractor, at his request, certain building material consisting of glass, and performed work for him, to the amount and value of $715.69, all in and about the construction, repairing, and erection of a building for defendant *Laube*, on lands owned by him, which were particularly described; that the building material was furnished pursuant to a contract with said Steinman; that the work was performed upon, and the building material sold for use and actually used in the construction of, the building mentioned; that the last day of the performance of such work and the furnishing of such material was January 16, 1896, and that within sixty days thereafter plaintiff gave notice in writing to defendant *Laube* and the contractor, Steinman, which notice set forth the contract out of which the indebtedness arose, a statement of the work performed and material furnished, and that plaintiff claimed a lien for the amount due therefor under ch. 143, R. S. 1878, and the acts amendatory thereof. There were further necessary allegations in regard to the filing of the lien petition.

The answer contained a denial of the allegation of the complaint as to serving notice of the claim for a lien on the defendant *Laube;* also as to building material having been furnished and work done by plaintiff in the construction of

the building on and between October 18, 1895, and January 16, 1896; and an allegation that the last material furnished and work done was December 11, 1895. It took issue on the allegations of the complaint as to the amount and value of the material and work, and contained an allegation that the contract between defendant *Laube* and the contractor, Steinman, also the contract between the contractor, Steinman, and the plaintiff, called for French plate glass for the front of the building, and that the glass furnished was of an inferior grade of American plate glass, of which fact defendant *Laube* had no knowledge till about the time of the commencement of this action.

On the trial a jury was impaneled and sworn on the court's own motion. The proof showed that no notice in writing was served on the defendant *Laube*. Evidence was offered to show that *Laube* was not in the county where such service could have been made, and that in lieu thereof the notice was filed in the office of the clerk of the circuit court for the county. All of the evidence in that regard was received under objection, and the rulings admitting the same were duly excepted to. The point that plaintiff was confined to proof of service of a notice in writing, of a claim for a lien, as required by the statute, upon the defendant *Laube* under the allegations of the complaint, was preserved throughout the trial. The court offered to allow the plaintiff to amend the complaint in accordance with the facts, which was refused, plaintiff electing to stand on the complaint as originally drawn and served.

At the close of the evidence the court held that the facts were all established beyond dispute, and against the objection of defendant *Laube* directed the jury to render a verdict finding the facts as indicated by the court. A verdict was rendered accordingly, finding, in substance, that all of the allegations of the complaint were established, and also that the defendant *Laube* was not in the county where no-

tice of the claim for subcontractor's lien could have been served upon him within the time required by law, and that the notice of such claim was filed as required by the statute in such cases in the office of the clerk of the circuit court for Green county. The court adopted the verdict of the jury as and for findings of fact in the case, and rendered judgment accordingly. Exceptions were taken to preserve the questions treated in the opinion.

For the appellant there were briefs by *A. S. Douglas* and *Smith & Pierce*, and oral argument by *William Smith* and *A. S. Douglas.*

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood*, attorneys, and *Fethers, Jeffris, Fifield & Mouat*, of counsel, and oral argument by *M. G. Jeffris.*

The following opinion was filed February 8, 1898:

MARSHALL, J. By sec. 3315, R. S. 1878, as amended by ch. 321, Laws of 1891, a subcontractor is entitled to a lien upon condition that within sixty days after the performance of the work or labor, or furnishing of the materials, for which the lien is claimed, he gives notice in writing, to the owner of the building, or his agent, of the property to be affected by such lien, setting forth the facts required, if such owner or agent can be found in the county; and otherwise that he files such notice in the office of the clerk of the circuit court for such county. The remedy thus given being wholly statutory, strict performance of all the conditions precedent, to entitle the subcontractor to it, is required. That must be alleged in the complaint, and, unless admitted by the answer or otherwise established by the evidence, the lien fails. No citation of authority or extensive discussion of a rule so elementary seems to be necessary. *Thompson v. Milwaukee*, 69 Wis. 492; *Dewey v. Fifield*, 2 Wis. 73. It may be stated as a universal rule that where a right or remedy is given by statute only upon the performance of certain conditions,

performance of such conditions must be alleged in the complaint and established on the trial, unless admitted by the pleadings. 4 Ency. of Pl. & Pr. 655, and cases cited; *Plum v. Fond du Lac*, 51 Wis. 393. It is not doubted but that in case of a variance between the allegations of the complaint and the proof, where the evidence has been received without objection and shows that all the facts exist requisite to the enforcement of the remedy, the defect may be cured by amendment on proper terms on the trial, or disregarded on appeal if raised in the appellate court for the first time; but where there is a failure to establish performance of the condition alleged, evidence cannot be properly received against objection to show the performance of some other condition which will save the remedy, or such evidence considered if the same be received against objection, and proper exceptions taken. The proper course obviously is, in such circumstances, to amend the complaint in accordance with the facts. Plaintiff not only neglected but refused to do that; hence, as we view the statute, the case stands without proof of the performance of the condition, without which the action against the appellant cannot be maintained.

The contention that the statute provides three methods of serving notice in writing by the subcontractor: First, by personal service on the owner if found in the county; second, by service of the notice upon the agent of the property to be affected by the lien, if to be found in the county; third, by filing the notice in the office of the clerk of the circuit court of the county,—can only be maintained, as we view it, by reading into the statute language that is not there and resorting to judicial construction where the language is plain and its meaning unmistakable. That we cannot properly do. The language of the statute is: "If, within sixty days after performing such work or labor, or furnishing such materials, he shall give notice in writing to the owner or his agent, of the property, . . if to be found in the county,

and if said owner or agent cannot be found in such county, by filing a notice in writing, in the office of the clerk of the circuit court of said county. . . ." The words, "by filing a notice," etc., relate, obviously, to the words "give notice in writing," and not to the words "to the owner." Therefore, clearly, such filing is not sufficient, except on condition that notice in writing cannot be given to the owner or agent.

It is to be regretted that the error in the construction of the statute makes a reversal of a judgment necessary, where it is plain that the facts exist, entitling plaintiff to his lien and judgment; but well-settled rules of pleading cannot be ignored to avoid the consequences of wrong statutory construction.

It is contended by the appellant that the court erred in refusing to submit the issues on the evidence to the jury. Actions to enforce mechanics' or materialmen's liens under ch. 143, R. S. 1878, as amended, are suits in equity, with the added feature in sec. 3323, R. S. 1878, of the right of either party, on demand therefor, to have any issue of fact submitted to a jury, whose verdict thereon shall be conclusive. *Willer v. Bergenthal*, 50 Wis. 474. Such section plainly contemplates that the demand therein mentioned shall be made at the commencement of the trial, and that it shall specify, specifically, the issue or issues which the party desires to have submitted to the jury, so that such issue or issues may be covered by special questions to be answered by the jury in the form of a special verdict. If no such demand be made, the statutory right is thereby waived. Nevertheless, the court may, of its own motion, submit questions of fact to a jury, whose verdict in that case is advisory only. *Bartlett v. Clough*, 94 Wis. 196. No demand was made here by the appellant, before the commencement of the trial, for the submission of any particular issue or issues to the jury, nor was any demand whatever, at that time, made for a jury trial. The court impaneled a jury of its own motion. It

must be deemed to have been done, not under sec. 3323, R. S. 1878, but under sec. 2843, R. S. 1878, which expressly authorizes the court, in an equity case, to take the advice of a jury on questions of fact. When a jury is impaneled under the latter section, the court may, at any stage of the proceedings, withdraw the case entirely from the jury, or may, after they have rendered their verdict, set it aside and disregard it altogether. *Carroll's Will*, 50 Wis. 437; *Bartlett v. Clough, supra.*

From what has preceded it will be seen that the demand for the submission of issues to the jury, made at the close of the evidence, came too late. The right had been waived. The withdrawal of the case from the jury, by the court, even if it be true that the evidence was conflicting, was clearly a matter within the discretion of the court, and not subject to review on this appeal.

Numerous exceptions were filed to the findings of fact made by the court, all of which have received consideration without discovering any ground for disturbing any of such findings, under the rule that findings of fact by the trial court must prevail on appeal unless shown to be contrary to the clear preponderance of the evidence.

It follows that the judgment of the circuit court must be reversed and the cause remanded with directions to dismiss the complaint as to the appellant and his property, and to render judgment in his favor for costs to be taxed, unless, within thirty days after notice in writing to the plaintiff's attorneys, of the filing of the *remittitur* in the office of the clerk of the circuit court for Green county, it obtains leave of the trial court, on such terms as it may deem equitable, to amend the complaint so as to allege performance of the condition precedent in respect to the filing of the notice, in writing, of the subcontractor's claim for a lien, in the office of the clerk of the circuit court for Green county, and the existence of the condition rendering such filing proper under

the statutes governing the subject. In case such amendment is made, the trial court is directed to render judgment in accordance with the findings and conclusions of the court. Costs in this court in favor of the appellant are limited to clerk's fees, attorney's fees, and $25 for printing.

By the Court.— So ordered.

BARDEEN, J., took no part.

A motion for a rehearing was denied April 12, 1898.

---

99 178
99 559

99 178
100 35
101 125

99 178
s104 580
104 606

99 178
105 332

99 178
f106 507
f106 511

99 178
107 492
d108 97

99 178
109 297
d109 298

99 178
118 [2]449

99 178
117 [2]323

WILKINS, Respondent, vs. NICOLAI and another, Appellants.

January 18 — April 12, 1898.

Easements: Prescription: Adverse use.

1. By twenty years of open, notorious, continuous, adverse use and enjoyment of an artificial ditch to drain water from the land of one person onto and across that of an adjoining owner, by the consent of such owner, such person acquires by prescription the right to a continuance of such use and enjoyment.
2. Such open, notorious, and continuous use for twenty years, without objection from the servient owner, is *prima facie* evidence of adverse possession or use, and, together with such circumstances, establishes title by prescription, unless explained as consistent with the title of the true owner by some showing that such use was under a lease, contract, or permission of some kind.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

Action for a mandatory injunction compelling defendants to lower a culvert on their premises so as to allow the water to flow freely from adjoining land on the east, owned by plaintiff, onto and across such premises, and to restrain defendants permanently from thereafter obstructing such flow. The trial resulted in findings of fact covering the issues raised by the pleadings, in substance as follows:

(1) Plaintiff and defendants are severally the owners of

land as alleged in the complaint, plaintiff's land being on the west side of the defendants'.

(2) Near the westerly side of plaintiff's land there is a marsh of about eight acres, onto which water drains from the surrounding country. Near the northerly side of the marsh is a spring where water comes, naturally, to the surface, and from which, some years ago, a ditch was dug, connecting with another drainage ditch, through the center of the marsh, in which there has customarily been some flow of water from the spring.

(3) At the easterly end of the marsh, in a state of nature, there was a ridge of dry land, forming a natural obstruction to the flow of water from the marsh onto defendants' land, unless there was considerable surface water. From twenty to forty years ago the water from some natural springs northeast of plaintiff's land, which flowed southeasterly in a natural channel called Soft Water Brook, was diverted so as to flow by an artificial channel southwesterly into a pond eighty rods northeast of the marsh, thence northwesterly into a natural channel into the marsh, and then through the high land before spoken of, on the east end thereof, onto defendants' land by way of a ditch cut through such high land more than thirty years ago for that purpose. Through such ditch, ever since its construction, in ordinary seasons, water flowed a considerable portion of the time, being the drainage from the marsh, the water from the spring thereon, and the water diverted as aforesaid.

(4) For years defendants have maintained a private roadway on their land along near the boundary line between the lands of the parties and across the artificial watercourse aforesaid, the roadbed being raised somewhat, so that, in the absence of a passageway under it, it would form a dam and prevent the flow of water off from plaintiff's land by way of the ditch. In the construction of such road a culvert was placed under the same so as to provide a free passage for

the water coming off from plaintiff's land as aforesaid, which culvert has been maintained for many years.

(5) About May, 1895, defendants raised the bed of the culvert ten inches, so as to obstruct the flow of water through the same, and have ever since refused to remove such obstruction, though often requested by plaintiff so to do.

(6) Plaintiff has been damaged by the act of the defendants aforesaid in the sum of one dollar, and will be damaged continually unless defendants are compelled by the court to remove the obstruction and permanently refrain from interfering with any flow of water thereafter through such culvert.

(7) The ditch above mentioned has been maintained, and the passageway for water therein from plaintiff's land onto defendants' and through the culvert, under the roadway aforesaid, has been enjoyed, by plaintiff and those preceding him in ownership of the land, open, continuous, notorious, adverse, and acquiesced in by defendants and those preceding them in ownership of their land, for more than twenty years, whereby plaintiff has acquired the prescriptive right to a continuance of such use and enjoyment.

On the facts so found, the court concluded as a matter of law that plaintiff was entitled to the mandatory and permanent injunction prayed for, and to recover of the defendants his damages and costs. Exceptions were filed so as to present the questions discussed in the opinion. Judgment was rendered for the plaintiff in accordance with the foregoing, and defendants appealed.

Lindley Collins, for the appellants, argued that a permissive right cannot merge into a prescriptive right. *Pettigrew v. Evansville*, 25 Wis. 227; *Fryer v. Warne*, 29 id. 511. An uninterrupted enjoyment of an artificial watercourse for twenty years will not give a permanent right to maintain it. Tiedeman, Real Property, 588, and cases cited.

For the respondent there was a brief by *Pierce & Daubner*, and oral argument by *W. A. Pierce*.

The following opinion was filed February 8, 1898:

MARSHALL, J. There is no serious controversy but that respondent is entitled to the relief granted by the judgment appealed from, if the findings of fact are warranted by the evidence. The real groundwork of respondent's recovery is the finding that he, and those under or through whom he claims title, had, for more than twenty years, maintained a ditch to drain water off from his land onto the lands of the defendants, thence through a culvert under a private roadway on the latter's land, near the division line between the lands of the parties; that such maintenance of the waterway and enjoyment of its use was continuous, adverse, open, notorious, and without objection from the defendants and those preceding them in ownership. Such facts constitute all the elements of a prescriptive right, and do not come within the rule which prevails ordinarily, that one cannot acquire a right by prescription to have mere surface water flow naturally over the surface of his land onto and across the land of another, but within the other rule that the owner of land may, by draining such land of surface and other water by an artificial waterway onto or through the land of another, openly, continuously, adversely, and with the consent of such other, for a period of twenty years, acquire an easement in the latter's land for a continuance of such drainage. Gould, Waters, § 279; *White v. Chapin*, 12 Allen, 516; *Conklin v. Boyd*, 46 Mich. 56; *Curtis v. Eastern R. Co.* 98 Mass. 428; *Rathke v. Gardner*, 134 Mass. 14.

It follows that unless we can say that some one of the findings of fact, as to the elements of a prescriptive right, is against the clear preponderance of the evidence, the judgment appealed from is right, if the finding as to the defendants' having obstructed and interfered with the continued

enjoyment of the easement claimed by the plaintiff, is also supported by the evidence.

It is argued at some length by appellants' counsel that there can be no prescriptive right founded on a mere permissive use. Such is unquestionably the law. Mere permissive use for any length of time does not create a right by prescription. *Pettigrew v. Evansville*, 25 Wis. 223; *Fryer v. Warne*, 29 Wis. 511. Such rule has no application, however, to the findings of fact in this case, and no application to the evidence preserved in the record. There is no affirmative evidence of how the use in question commenced. The circumstances found by the court, which are amply supported by the evidence, that the use was continuous, open, notorious, and without objection for more than twenty years, stand without any evidence to explain them. From such circumstances the court further found, as an inference of fact, that the use was adverse and acquiesced in; that is, that it commenced under claim of right hostile to the whole world, and was continued without interruption or objection down to the expiration of the period requisite to raise the presumption of a previous grant. *Lampman v. Van Alstyne*, 94 Wis. 417. Was such inference warranted, is a question properly presented by one of appellants' exceptions, though hardly reached by the assignments of error; nevertheless such question should be decided, as it strikes at the very root of respondent's right to recover. The rule that the evidence of adverse possession must be clear and positive, and should be strictly construed against the person claiming a prescriptive right, and that every reasonable presumption should be given in favor of the true owner, is fully recognized; but along with such rule is another just as firmly established,— that open, notorious, and continued use without objection, for more than twenty years, unexplained, establishes the fact of adverse possession from the beginning, and a perfect title by prescription. Said Mr. Justice New-

MAN, in the opinion of the court in *Carmody v. Mulrooney*, 87 Wis. 552, speaking of the acquirement of an easement in the manner under discussion: Unexplained use, continued for twenty years, raises the presumption that such use was under claim of right and adverse, and is as to such fact sufficient, unless rebutted by the landowner by showing it was under a lease, contract, or permission of some kind, to establish such right by prescription. 3 Kent, Comm. 442; *Miller v. Garlock*, 8 Barb. 153; *Hammond v. Zehner*, 23 Barb. 473; Jones, Ev. § 80. To the same effect, in *Smith v. Miller*, 11 Gray, 145, speaking of such an easement as the one here claimed, the court said: "A right to an easement of that kind in the land of another may undoubtedly be acquired by the enjoyment of it, provided that enjoyment is adverse, uninterrupted, and of sufficient continuance and duration, and the actual exercise or enjoyment of the right contended for is *prima facie* evidence of prescription, and is sufficient to show a title to the easement which is claimed." So, to the same effect, is *Prescott v. White*, 21 Pick. 342, where Chief Justice SHAW used this language: "It must be taken, according to established rules of law, that the run of such a canal through the land of another for the time stated is evidence of an antecedent grant."

From what has preceded, obviously, the finding of fact as to adverse use followed as a necessary inference from the finding of open, notorious, and continued use without objection for more than twenty years, which latter facts are considered supported by the evidence. If the *prima facie* case, made by such continuous use, had been met by proof that it was under a license or contract, or permission of some character, or explained in some way as not hostile to the title of the true owner, the presumption of adverse use arising from the evidentiary facts stated would have been destroyed; but there was no evidence whatever produced on the subject. There is affirmative evidence, however, of a recogni-

tion for many years of plaintiff's right to use the drainage ditch as contended for, in that, in the construction and maintenance of the private road, during substantially the whole period, defendants maintained the culvert under it for the free passage of the water coming down from the marsh through the ditch.

Exceptions were taken to the findings as to the obstruction and threatened continuance thereof, of the waterway at the culvert on defendants' land. The evidence bearing on that subject has been examined without perceiving any sufficient reason to disturb such finding.

By the Court.—The judgment of the county court is affirmed.

BARDEEN, J., took no part.

A motion for a rehearing was denied April 12, 1898.

---

99 184
h109 181
99 184
58 LRA 880

WINKLER, Appellant, vs. RACINE WAGON & CARRIAGE COMPANY, Respondent.

March 1—April 12, 1898.

Master and servant: Damages for wrongful discharge: Burden of proof: Pleading: Appeal.

1. An employee who has been wrongfully discharged by his employer before the expiration of the contract period may wait until after such time, and then sue and recover the amount which he would have earned under such contract, less what he might have, in the meantime, earned elsewhere.
2. In an action by an employee to recover damages for such wrongful discharge, the burden of proving in mitigation of damages, that the plaintiff could have obtained employment elsewhere, is upon the defendant.
3. A complaint which alleges the contract by which the plaintiff was employed, and his wrongful discharge before the expiration of the contract period, states a cause of action for a breach of the contract, and the averment that there is now "due the plaintiff by

virtue of such contract" a certain sum, naming the balance which he would have earned under the contract, does not make it an action for wages.

4. Where the objection to a complaint is raised *ore tenus* at the trial, the complaint should be construed liberally and with a view to substantial justice, and not so as to defeat it by undue technicality.

5. Where an order sustaining a demurrer to the complaint and awarding costs is reversed on appeal, another order setting off those costs against costs awarded to the plaintiff on dismissal of the defendant's counterclaim should also be reversed.

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Reversed.*

Action upon contract. The complaint was to the effect that on and prior to January 1, 1894, the defendant entered into a contract and agreement with the plaintiff, whereby, in consideration of the plaintiff entering and continuing in the employ of the defendant as a carriage maker for the period of one year from and after January 1, 1894, the defendant would pay the plaintiff for such work, labor, and services $1,500 on or before January 1, 1895; that, under said contract, he entered into the defendant's employ January 1, 1894, and continued therein until November 1, 1894, when the defendant, without cause, justification, or excuse, dismissed plaintiff from its employ, and although the plaintiff was willing and ready to continue in such employ, and fully perform such contract on his part, refused to permit him to work further for it, and compelled him to seek employment elsewhere, which he did, diligently, without avail; that, excepting the sum of $1,250 paid thereon at various times, no part of said contract price had been paid by the defendant; and that "there is now due the plaintiff herein, by virtue of such contract, the sum of $250," which the defendant refused to pay, and for which judgment was demanded. The defendant, by its answer, denied that the plaintiff was employed to work for it for one year from January 1, 1894,

to January 1, 1895, for $1,500, and denied that the plaintiff worked for it by the year, but alleged that he worked for it during the year 1894, under a contract by which he was to receive $125 per month, and was paid at that rate for his work from January 1, 1894, to November 1, 1894, being $1,250, which was in full payment for all work that he had performed for the defendant; that the plaintiff was discharged for insubordination and disobedience to defendant's lawful orders. The defendant pleaded two counterclaims, upon which it demanded judgment for $1,500.

At the trial, before the court and jury, the defendant demurred *ore tenus* to the plaintiff's complaint, on the ground that the plaintiff's action could not be sustained for wages that had never been earned; that he did not work for the defendant any part of the time for which he claimed wages; and that the only action he had against the defendant was for breach of contract. The court sustained the demurrer, and adjudged that the complaint be dismissed, with costs in favor of the defendant for $49.14. The court dismissed the defendant's counterclaims for failure on its part to produce proof in support of them, and taxed costs on such dismissal in favor of the plaintiff at $49.06. Afterwards the defendant moved the court for an amendment to the order of the court allowing judgment of nonsuit, with costs on said counterclaims; but the court ordered that the plaintiff's costs on such counterclaims as taxed by the clerk be offset against the costs of the defendant taxed in its favor against the plaintiff in the action, and that, to such extent, such judgment for costs be marked "Satisfied" upon the record, but without costs to either party.

The plaintiff appealed from the order offsetting said costs, and from the judgment sustaining the demurrer *ore tenus* to the complaint.

For the appellant there was a brief by *Kearney & Thompson*, and oral argument by *T. M. Kearney*.

For the respondent there was a brief by *Hand & Hand*, attorneys, and *Winkler, Flanders, Smith, Bottum & Vilas*, of counsel, and oral argument by *E. P. Vilas*. They argued, among other things, that the action was improperly brought for the recovery of wages. It should be in tort for a breach of the contract. *Howard v. Daly*, 61 N. Y. 362; *Weed v. Burt*, 78 id. 101; *James v. Allen Co.* 44 Ohio St. 226; *Keedy v. Long*, 5 L. R. A. 759; *Chamberlin v. Morgan*, 68 Pa. St. 169; *Willoughby v. Thomas*, 24 Gratt. 521; *Olmstead v. Bach*, 22 L. R. A. 74; *Efron v. Clayton*, 35 S. W. Rep. 434; *Lichtenstein v. Brooks*, 75 Tex. 196; *Bennett v. Morton*, 46 Minn. 113; Wood, Master & S. 246, 247.

PINNEY, J. The defendant's contention is that if, as is alleged in the complaint, the plaintiff was wrongfully discharged by the defendant before the expiration of the stipulated period of his service, he cannot sue for and recover the unpaid portion of the stipulated wages, except for past services rendered and for such sums of money as had already become due; that, as far as any other claim on the contract is concerned, he should have sued for the injury he had sustained by his wrongful discharge and breach of the contract in not being allowed to serve the stipulated period, and earn the wages agreed on, relying on the rule laid down in *Howard v. Daly*, 61 N. Y. 362; and *Weed v. Burt*, 78 N. Y. 191. The general rule is that when a contract is entire, as in the present case, it is necessary for a party to show full performance on his part before he can maintain an action upon it. The authorities recognize certain exceptions to the rule, as where performance has been rendered impossible by the act of God, by the act of the law, or by the act of the other party. *Jennings v. Lyons*, 39 Wis. 557. The defendant having wrongfully discharged the plaintiff and refused to receive his services or permit him to complete his contract of service, the plaintiff had the right to treat it as broken, and to sue on it and recover to the date of the expiration of the contract ac-

cording to its terms, and the measure of his damages *prima facie* would be the contract price of the work; but the defendant might mitigate the damages by showing that the party might have obtained other employment elsewhere. The burden of showing this is on the defendant. In *Danley v. Williams*, 16 Wis. 581, it was held that where one contracts to work for another, either for a specified time or until he finished a building or other work, if he is prevented by the fault of the hirer he is certainly damaged to the extent of the sum he would have received for his services unless he could obtain other employment in the meantime. "In the absence, therefore, of any evidence that the party might have obtained any other employment, the law can adopt no other rule of damages than the contract price, unless there is some legal presumption that such other employment might be obtained." *Barker v. Knickerbocker L. Ins. Co.* 24 Wis. 630.

The complaint counts, in substance, upon a breach by defendant of the contract between the parties, in that it, without justification or excuse, dismissed the plaintiff from its employment, notwithstanding he was ready and willing to continue in its employment and fully perform the contract on his part, and compelled him to seek employment elsewhere. It seems to be the settled law of this state that, where a party is thus wrongfully discharged by the employer before the expiration of the contract period, he may wait until such period arrives, and then recover against the employer the wages he would have earned but for such wrongful discharge, less what he could have earned by employment elsewhere, which will be in reduction of damages. *Gordon v. Brewster*, 7 Wis. 355; *La Coursier v. Russell*, 82 Wis. 265; *Littlefield v. William Bergenthal Co.* 87 Wis. 394.

It savors of over-refinement and extreme technicality to say that the action as framed is not in substance founded upon the breach of contract stated, in consequence of the wrongful and improper discharge of the plaintiff. The aver-

ment in the complaint that "there is now due the plaintiff, by virtue of such contract, $250," is no more than saying that the plaintiff's damages for such breach amounted to that sum, and would seem to be but the equivalent of a claim not technically for wages, but for compensation for breach of the contract. We think that the complaint states in a clear and concise manner all the facts necessary to show that the plaintiff had a cause of action against the defendant for a breach of the contract between the parties, and to recover damages according to the rule stated in the cases cited. It is true that it is alleged in the complaint that there is due the plaintiff, by virtue of such contract, the sum of $250, all of which the defendant neglects and refuses to pay, and for which judgment is demanded. The assumption that the action is for *wages* rather than for compensation under the contract on account of its breach is not justified by the allegations of the complaint. The objection to the complaint was raised *ore tenus* at the trial, and the court should have construed the complaint liberally, and with a view to substantial justice, and not so as to defeat it by undue technicality of construction. We hold, therefore, that the court erred in sustaining the defendant's demurrer *ore tenus*, and that the judgment given thereon as stated must be reversed.

Inasmuch as the judgment against the plaintiff on the defendant's demurrer *ore tenus* to the complaint and for costs is reversed as erroneous, it follows that the order setting off the costs should also be reversed; so that the plaintiff may proceed to collect the judgment for costs awarded to him on the dismissal of the defendant's counterclaims, and from which there has been no appeal.

By the Court.—The judgment of the circuit court on the demurrer *ore tenus* to the plaintiff's complaint is reversed, and the cause remanded for a new trial; and the order offsetting the costs in the circuit court on the dismissal of the defendant's counterclaims, in favor of the plaintiff, against the costs awarded to the defendant is reversed.

99 190
103 35
103 67

RITGER, Administratrix, Appellant, vs. THE CITY OF MILWAUKEE and others, Respondents.

March 2 — April 12, 1898.

Municipal corporations: Liability for obstructions in street: Runaway horse: Contributory negligence of driver: Proximate cause.

1. The contributory negligence of the driver of a private conveyance in which another person is voluntarily riding at the time of his injury is imputable to the person so injured, and will prevent a recovery by him for the injury sustained.
2. There can be no recovery against a town or city for injuries caused by a runaway or uncontrollable horse.
3. Where, in an action for an injury received by reason of an obstruction in a street, the evidence shows that the injury was sustained while plaintiff's horse was running away, such running away must be deemed the proximate cause of the injury.
4. Where, in such action, the evidence was clear that the driver had more than momentarily lost control of the horse at the time of the injury, and there was no evidence which could sustain a verdict in favor of the plaintiff, a nonsuit was properly granted.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Action brought by the plaintiff, the widow of John Ritger, deceased, and administratrix of his estate, against the defendants, to recover damages for injuries alleged to have been received by her husband, John Ritger, on the 6th of July, 1895, caused by the negligence of the defendants, and from the effects of which he died.

On and prior to the time in question the Milwaukee Street Railway Company, managed by the defendants *Henry C. Payne* and *George R. Sheldon* as receivers, was operating an electric railway line along the center of Walnut street, at its intersection with Lisbon avenue and Twenty-Fourth street; and it appeared that center poles for the support of wires were placed along the center of Walnut street; that the defendant the city of *Milwaukee* authorized by ordinance the placing of said center poles in the center of Wal-

nut street, but not within street crossings; that the city of *Milwaukee* permitted the placing, and the street railway company, by its receivers, placed and maintained, a center pole in the center of Walnut street, and within six and two-tenths feet of the center of Lisbon avenue, at the intersection of Lisbon avenue, Walnut street, and Twenty-Fourth street, and upon the east line of Twenty-Fourth street; that said center pole was within the crossing, and at the center of the crossing, of Lisbon avenue and Walnut street, and it was claimed that the same was a dangerous obstruction and nuisance to the traveled part of Walnut street and Lisbon avenue, and a nuisance to persons traveling on said streets.

It was charged that said center pole was knowingly, unlawfully, and negligently supported and maintained by the defendants in said place for more than two years prior to July 6, 1895, and that on the night of that day John Ritger, plaintiff's husband, when lawfully and carefully driving along Lisbon avenue, at 12 o'clock at night, was, without fault or negligence on his part, thrown against said center pole by reason of the left wheel of the wagon striking violently against said pole, which was so obstructing the traveled part of the crossings of said streets, whereby he received injuries which caused his death.

The answer of the receivers admitted the location and intersection of the streets, and the location of the center poles, except that the one in question was in the center of the crossing at the intersection of Lisbon avenue and Walnut street. The answer alleged ignorance of the death of Ritger, and averred that his injuries and death were the result of his own negligence.

The answer of the defendant city admitted the location and maintenance of the public streets mentioned in the complaint, and its obligation to keep them in reasonable repair and free from obstruction, and admitted the passage of the ordinance authorizing the street railway company to equip

its lines with electric power, but denied that the center pole described in the complaint was placed at the intersection of Walnut street, Lisbon avenue, and Twenty-Fourth street with the knowledge of the defendant city, and alleged a want of knowledge of any obstruction being in those streets as alleged. It also alleged that Ritger at the time of his injury was riding along said street in a wagon drawn by one horse, and driven by a man unknown to the defendant, and that the horse and wagon were driven in a careless and reckless manner, which contributed to and caused the injuries of said Ritger; and it averred that, if there was any negligence in placing said pole at said point of intersection, it was the fault and negligence of the street railway company, and that said receivers were therefore primarily liable for all damages on account of the injuries complained of.

The issues came on for trial before the court and jury. At the close of the testimony on the part of the plaintiff the defendant city moved for a nonsuit, for the reason that it was not shown that the city was in any way liable for the accident, or had contributed to it, and for the further reason that the driver was guilty of negligence which contributed to the injury. The motion for nonsuit was granted; the defendant receivers having joined in the motion. It is conceded that the circuit court, in granting the defendants' motion for nonsuit, assumed that the center post, C, might be considered a dangerous obstruction, for the trial court said: "There has been evidence tending to show that this [meaning the center pole, C] may be dangerous to horses passing along over the avenue or the street at that crossing. There is evidence tending to show that a more judicious distribution of the posts would be less dangerous. So, upon that question, I have come to the conclusion to submit it to the jury whether or not, under the circumstances of the case, and of the crossings here, the post was an obstruction to the safe use of the street." It is therefore plain that had

it not been for the view that the court took of the other branch of the case, namely, in regard to the condition of the horse at the time of the injury, the issues would have been submitted to the jury for a verdict, and that the case was withdrawn from the jury simply and solely on the ground that the horse, at the time the buggy collided with the center post, was running away, and had wholly passed beyond the control of the driver, and proceeded on its way until the vehicle encountered the center pole.

Referring to this question, the trial judge states, as shown by the record: "All the evidence tends to show that at that point where the electric light was hung the horse became frightened and became unmanageable, and the driver again and again states that he lost all control of him at that point. He dashed with more or less speed eastward, and ran his buggy against the post. The plaintiff was thrown out and killed, or so grievously injured that he died some eighteen days later. Is this the case of a horse and driver, the horse becoming frightened and unmanageable, and the driver losing control of him, and subsequently, in the course of the flying horse's career, an obstruction is struck, and injury results? Or is it the case where the horse becomes *momentarily* frightened, and does not become a runaway horse, and, as a result of the fright, encounters an obstruction in the highway, to the injury of the driver, or the person accompanying the driver? Upon the view I have taken of the facts in this case, I will consider it the case of a *runaway* horse escaping entirely from the driver, and proceeding on its way until he encounters an obstruction in the highway." Counsel for the appellant concedes that, had it not been for the view which the court took in regard to the condition of the horse at the time of the injury, there is no doubt the question as to whether the post was a dangerous obstruction would have been submitted to the jury for decision.

The testimony of Otto Neuman, plaintiff's witness, shows

that he and the plaintiff's intestate, Ritger, both residents of Milwaukee, were riding along Lisbon avenue on the night of July 6, 1895, with a horse and buggy belonging to Neuman, who was driving. They had been to a meeting at the Shooting Park, on Third street, the deceased riding there and back with Neuman. They went there about 8 o'clock p. m. This was about five miles from the scene of the accident, in another part of the city. Neuman was thirty-four years old, and had known Ritger for six months prior to the injury. On their return from the park they drove down Third street, then out on North avenue, stopping at one or two places, and then, when they came to Lisbon avenue, turned in and drove southeast on Libson avenue until they came to the intersection of Lisbon avenue and Walnut street, *where the horse was frightened by the electric light, and ran against the pole*, C, both Neuman and deceased being thrown out, and the horse, freed from the buggy, ran away. Ritger struck against the trolley post, C, and received injuries from which he died.

Neuman testified, that when he drove in on Lisbon avenue, it was after 10 o'clock, and he drove down as far as Twenty-Fourth street. "*There my horse got scared, and made a jump, and started to run.* This was right *on the corner of Lisbon avenue and Walnut street.* I was intending to go down Walnut street, east. My horse seemed to get frightened at the electric light. It kind of flickered, and he jumped to the left, and the left front wheel struck the center trolley post. [It was admitted that the post, C, designated on the plat, was the one he struck.] When the wheel struck the post, we both flew out of the buggy. I landed on the ground, straight, and he flew against the trolley post, striking on the head. The horse run away, and I flew like this over the dashboard. *I couldn't hold him, and the horse run off.* The striking broke the left front wheel, and the crosspiece in the thill. That was all. Ritger was

carried into a doctor's office, and taken to the hospital. As we came down Lisbon avenue, Ritger was sitting on the left-hand side of the buggy. I was driving, and *was trying to hold the horse* when the pole was struck. I said, 'Whoa, Tom!' but *all at once he struck the post, before I was able to stop him.* I was accustomed to handling horses at that time. I was driving southeast on Lisbon avenue, on the right-hand side, going toward Walnut. When I came along where the electric light was, I was driving *on an ordinary trot;* was on the north side of that light, which hangs at the corner of Twenty-Fourth and Walnut streets. When my horse got scared I was right under that lamp in the center of the street, but on the right-hand side of Lisbon avenue when I was coming this way. I wanted to go down Walnut street, but I didn't commence turning before I got to the lamp. When I got to the light, my horse turned to the left. I intended to go around on Walnut street, and to do that I had to turn to the left. It was shortly before I got to Twenty-Fourth street that I intended to turn east on Walnut. I had decided before I came to that lamp — probably a second before — to go down Walnut when I got *about under the lamp;* and *at* the time I came to the lamp *I had my horse under control, at an ordinary trot,* and after I came to the lamp I went *at an ordinary trot.* Q. You went right along in an ordinary trot until you trotted to the post? A. *No, sir; then the horse made a jump and tried to run.* Q. How was he going then? A. *Then he was going faster, when he was scared.* Q. *Was he running away?* A. *Yes, sir.* Q. *Out of your control?* A. *Yes, sir.* Q. You couldn't handle him? A. *No, sir.* Q. How fast was he going when he struck the post? A. I couldn't say. Q. How fast? A. *Pretty fast.* Q. On a good run? A. *Yes, sir.* Q. *You had lost all control of him at the time he came to the post?* A. *Yes, sir.* Q. Did you see that post when you got to the lamp? A. Yes, sir. I don't remember on what point west

of Twenty-Fourth street I struck Lisbon avenue. It was several blocks west of Twenty-Fourth street. I guess, about half a mile. Was driving east on Lisbon avenue when this happened. Just about the time when I got to the crossing of Walnut street and Twenty-Fourth street, I made up my mind I wanted to go east on Walnut, instead of on Lisbon. I have had twenty years' experience in driving a horse, and know how to handle a horse. Q. If you could have handled that horse at the time, could you have missed that post? A. *I couldn't handle him in a short distance.* Q. If you had him under control, could you have missed it? A. *I couldn't hold him.* Q. Suppose he had not run away, *if you had him under control*, would you have missed the pole? Was there room enough to drive by if the horse would not run away? A. Yes, sir."

After the court had nonsuited the plaintiff, she moved for a new trial; but her motion was overruled, and judgment entered in favor of the defendants for costs, from which the plaintiff appealed.

Orren T. Williams, for the appellant, argued, among other things, that the trolley post against which the wagon in which plaintiff's intestate struck was a dangerous obstruction in the street, and that the horse was not running away until after the collision, but was simply momentarily unmanageable, and the facts should have been submitted to the jury. *Thoresen v. La Crosse City R. Co.* 87 Wis. 605; *Little v. Superior R. T. R. Co.* 88 id. 406; *Vallin v. M. & N. R. Co.* 82 id. 5; *Hill v. Fond du Lac*, 56 id. 242; *Barstow v. Berlin*, 34 id. 361; *Draper v. Ironton*, 42 id. 697; *King v. Oshkosh*, 75 id. 518; *Sheffield v. Cent. U. Tel. Co.* 36 Fed. Rep. 165; *Wolfe v. Erie T. & T. Co.* 33 id. 320.

For the respondent city of *Milwaukee* there was a brief by *Howard Van Wyck*, city attorney, and *A. B. May*, assistant city attorney, and oral argument by *Mr. May*.

For the other respondents there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. P. Miller*.

PINNEY, J. When the plaintiff's intestate, Ritger, entered Neuman's private conveyance to ride with him, he made such conveyance, for the time being, his own, and assumed the risk of the skill and care of Neuman, the person driving it, whom he thereby made his agent for that purpose. The contributory negligence of Neuman, the driver of the private conveyance in which Ritger was voluntarily riding at the time he received the injury which resulted in his death, is imputable to Ritger, so as to prevent a recovery by the plaintiff, as his administratrix, in this action. *Prideaux v. Mineral Point*, 43 Wis. 513; *Otis v. Janesville*, 47 Wis. 422.

The uncontradicted evidence is clear and decisive to show that the horse attached to the buggy, and driven by Neuman, in which he and the plaintiff's intestate were riding, became frightened, but not by reason of any defect in the street, so that he became more than momentarily uncontrollable, and ran away, whereby he ran against the center post in the street, and the plaintiff's intestate was thrown out of the vehicle, receiving the injuries which caused his death. It has been repeatedly held that there can be no recovery against the town or city in consequence of injuries sustained by reason of a runaway or uncontrollable horse. *Jackson v. Bellevieu*, 30 Wis. 250; *Bishop v. Belle City St. R. Co.* 92 Wis. 139; *Schillinger v. Verona*, 96 Wis. 456. In the recent case of *McFarlane v. Sullivan*, *post*, p. 361, the subject was elaborately considered, with copious citations of authorities. The evidence is uncontradicted, clear, and decisive that the proximate cause of the injury which resulted in the death of the plaintiff's intestate was that the horse attached to the vehicle in which he was so riding had wholly passed beyond and escaped from the control of the driver, and ran away, so that the vehicle collided with the center pole, and Ritger thereby received fatal injuries. While it is alleged that the proximate cause of his death was the negligent acts and omissions of the defendants, the evidence

clearly shows that another adequate and independent cause intervened between the alleged negligence and the injury, and became the proximate cause of it.

It is beyond dispute that the primary cause of the injury, and which led, by regular sequence, to the death of Ritger, was the more than momentary escape of the horse from the control of the driver. This was the thing amiss, by reason of which the vehicle collided with the center post, with the result stated. The evidence does not show that the loss of control of the horse was merely momentary or accidental, or one which would have been at once regained if the vehicle had not come in contact with the center pole. It was not a case where the horse swerved quickly to one side, and the driver might readily have brought him to his proper position and course, but it was unmistakably the case of a runaway. The testimony of the driver is positive and emphatic, and against it there is no evidence from which any inference to the contrary can be fairly drawn. The driver's evidence is to the effect that it was after 10 o'clock at night; that they drove in on Lisbon avenue down to Twenty-Fourth street. "There my horse got scared, and made a jump, and started to run. This was right on the corner of Lisbon avenue and Walnut street. I was intending to go down Walnut street, east. My horse seemed to get frightened at the electric light. It kind of flickered, and he jumped to the left, and the left front wheel struck the center trolley post. When the wheel struck the post, we both flew out of the buggy. I landed on the ground, straight; and he flew against the trolley post, striking on the head." "The horse ran away. I couldn't hold him. . . . As we came down Lisbon avenue Ritger was sitting on the left-hand side of the buggy. I was driving, and was *trying to hold the horse* when the pole was struck. I said, 'Whoa, Tom!' but all at once he struck the post, before I was able to stop him." He further testified that when he came to the lamp he "had his

horse under control, and was going at an ordinary trot." "Then the horse made a jump and tried to run." "Then he was going faster when he got scared." The witness affirmed that the horse was running away; was out of his control; that he couldn't handle him; that when he struck the post "he was on a good run, and he had lost all control of him." "At the instant when the buggy struck the post, I was trying to hold the horse, saying, 'Whoa, Tom!' and hanging onto the lines, and I couldn't hold him any more." He expressed the opinion that he could have stopped the horse within 100 or 200 feet from the place where he was frightened, if he had not struck the post, and said he could not handle him in a short distance. His opinion was at best a mere conjecture, and does not appear to be supported by the attending facts and circumstances, which all clearly tend to show that the horse was more than momentarily uncontrollable. As against the positive statement of the witness Neuman, to the effect that the horse was running away and was beyond his control, and that this was a condition of more than momentary duration, no mere conjecture or inference, not sustained by competent and quite satisfactory evidence, could suffice to take the case to the jury.

It is stated in *Titus v. Northbridge*, 97 Mass. 258, that "when a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable." In such case it is considered that the conduct of the horse is the primary cause of the accident; that there are two efficient, independent, proximate causes,—the primary cause being one for which the corporation is not liable,

and as to which the driver himself is in no fault, and the other being a defect in the highway; hence it is impossible to determine that the accident would have happened but for the primary cause. Municipalities "are under no duty to provide for everything that may happen in the street, but only for such things as ordinarily exist, or may reasonably be expected to occur," and hence are not bound to so care for the streets that damage may not be caused thereon by horses which have escaped from the control of their driver and run away. Dillon, Mun. Corp. § 1015.

As was said in *Scannal v. Cambridge*, 163 Mass. 93: "It is difficult to discover any evidence on which the jury could find that this [Neuman's] loss of control of the horse was only momentary. If it was something more than a momentary accidental loss of control, which ought not to be treated as an independent, contributing cause of the injury, and was a permanent or long-continuing condition, the plaintiff would be precluded from recovery, even if the way were defective." In that case the plaintiff testified that he "had no more control of the horse than a baby would have; that he tried to pull the horse in, and to steer him out into the street again, but he couldn't do it." In the present case the driver had quite as little control over the horse, which was actually running away, and when the fact of inability to control, or readily to regain control of, the horse appears, the rule applies. It is not essential that this condition shall exist, if once established, during any definite period, or that the horse shall run any prescribed distance. Whether the case should have been submitted to the jury involved, upon the undisputed facts, a mere question of law, namely, whether the case, upon all the evidence, was open to any fair inference that the driver lost control of the horse more than momentarily. Against his clear statement of existing facts, we are unable to say, upon all the evidence, that any inference could be fairly drawn upon which a verdict for the

plaintiff could be properly supported. We think that the nonsuit was properly granted.

By the Court.— The judgment of the circuit court is affirmed.

TIEDE, Appellant, vs. SCHNEIDT, imp., Respondent.

99 201
L103 443
99 201
s105 476

March 3 — April 12, 1898.

Injunction, dissolution of: Hearing on motion.

1. A motion to dissolve a preliminary injunction and require the plaintiff to furnish additional security may, in the discretion of the court, be brought to a hearing without waiting to enable the plaintiff to procure an affidavit to be used only on the question of the sufficiency of the security, where it appears that he will not be prejudiced thereby.
2. Where in an action against the owner of an establishment for converting dead animals into marketable products, and a city with which he had contracted to dispose of all dead animals found in its streets, to enjoin the operation of said establishment as being a nuisance, the equities of the complaint were fully met and denied by the answer of such owner, a motion to dissolve a preliminary injunction was properly, in the discretion of the court, heard and decided without waiting for the city to answer.
3. The fact that the application for the injunction was supported by nine affidavits did not render it an abuse of discretion to dissolve the injunction, where there were numerous affidavits on the other side.
4. A court of equity will not lend its aid to prevent an illegal act, such as the violation of sec. 1418, R. S. 1878, prohibiting the keeping of slaughter houses upon the banks of any running stream, or depositing therein any dead animal, etc., merely because it is an illegal act, where no injury to property or property rights is alleged.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Action against the defendants for maintaining an establishment and manufactory alleged to be a nuisance, in which

dead animals and the carcasses and offal therefrom were collected and converted into marketable products, located on the banks of the Menomonee river, in the town of Wauwatosa, upon a lot of land described in the complaint, containing about eight acres, of which the plaintiff claimed that he had been at all times in possession for the past three years, and was the owner thereof, known as lot 11 in block 1, and upon which his dwelling house is located, wherein he resides and has resided during said period.

It is charged that since August 26, 1897, the defendants had maintained, and were still maintaining, said establishment upon the banks of the Menomonee river, and from that time until the present had continually and daily caused cattle, horses, and other animals to be brought upon said premises, and there killed, and other animals already dead to be brought there, and had daily and continually converted the same in said manufactory into marketable products, and had caused the blood and offal from said animals to be thrown and deposited into the waters of the Menomonee river, which flows past and across the premises aforesaid, opposite to and in the neighborhood of the premises of the plaintiff; that, by reason of the establishment and maintenance of the said manufactory, the same had become a nuisance to the public and all persons residing in the neighborhood or traveling upon the public streets, and that the plaintiff had during said period, and was still, suffering private and special injury therefrom, peculiar to himself, in the impregnation of the air upon and in the neighborhood of his said premises, caused and coming from the putrid substances of the said dead animals, etc., so collected and converted by defendants in said establishment and manufactory, whereby the occupation of his property had been rendered disagreeable, unwholesome, and offensive; that odors from said manufactory, and from the causes aforesaid, kept the air upon the plaintiff's premises constantly impregnated

with foul and unhealthy vapors and smells, so that his said property has become impaired and unfit for use and occupancy, to his great and irreparable damage; that the blood and offal from said dead animals were continually deposited through an open sewer from said manufactory into the waters of the said river, which were thereby polluted and rendered unwholesome and unfit for use, either for watering stock or for any domestic purpose; that said injury was continuous and constantly recurring; and that he was without remedy at law in the premises, in that it was not susceptible of adequate compensation in damages; that said river is a running stream, flowing through the city of Wauwatosa and the city of Milwaukee, in said county, and also through the town of Wauwatosa, in said county, which is an organized town, containing more than 200 inhabitants, constituting a part of the county of Milwaukee, and which county contains a population of over 100,000 people.

Plaintiff prayed that said manufactory of the defendants be adjudged to be a private nuisance to the plaintiff, and that he might recover from the defendants the damages which he had sustained by reason of the maintenance thereof, and that the court adjudge and direct that the said nuisance be abated and removed as provided by law, and in the meantime, and until the final hearing, a temporary injunction might be granted restraining the defendants, their agents, servants, etc., from maintaining said or any establishment or manufactory in which dead animals, or the carcasses and offal therefrom, are collected and converted by them, or either of them, into marketable products or otherwise, and from depositing any such carcasses or parts thereof or blood therefrom in the Menomonee river, whether the same consists of carcasses, offal, or blood of cattle, horses, sheep, or other animals, and such further and other relief, etc.

Upon the verified complaint of the plaintiff, a temporary injunction, in substance as above, was granted until the further order of the court in the premises.

The defendant *Schneidt* answered, admitting the ownership of the eight acres of land mentioned in the complaint, and alleged that he had maintained and operated for more than twenty-one years before the commencement of the action an establishment and manufactory for the purpose of and in which hair is and had at all said times been treated and manufactured substantially in the way and with substantially the same results upon the atmosphere as had been the case from the 26th of August, 1897, and claimed the right so to do peaceably, continuously, and without interruption or opposition; that during said time he had maintained and operated an establishment for the purpose of rendering dead animals, and converting their substance into a merchantable product, in the same way and with the same results upon the atmosphere as had been the case since the 26th of August, 1897; and during said twenty-one years he had on an average rendered daily one or more dead horses and other dead animals, and for that purpose he had carefully devised and caused to be constructed and put in place in his factory on said premises, an apparatus for reducing such carcasses in a sanitary and inoffensive manner, and otherwise made and constructed the necessary equipments for so carrying on said business; that, shortly prior to said 26th of August, the defendant the city of Milwaukee desired to contract with him for the disposal of dead animals to be found in the streets and other places in the city, and theretofore the carcasses of such animals had been rendered and disposed of by a corporation known as the Wisconsin Rendering Company, under a contract with the city, which expired during the summer of 1897; that it was absolutely necessary for the public health that said carcasses be promptly removed and disposed of, and thereupon the said city of Milwaukee and the defendant *Schneidt* made a contract whereby they were to be taken to his establishment, and he was to render and dispose of the same in a sanitary manner; and thenceforward, from the 26th day of August, 1897, he received from the defendant

the city of Milwaukee said carcasses, and disposed of them by means of the appliances and apparatus theretofore used by him, and in the same manner, so that all the organic matter from said carcasses was reduced to substances absolutely innoxious and inoffensive; that at all the time the work of reducing the same had been, and was at the time of the service of the injunction, carried on in steam-tight metal tanks, by means of live steam, and under steam pressure; and that no gas or effluvium then did or could escape from said carcasses or tanks during or after the said process of reduction; and that, save as above stated, there had been no collection or conversion or rendering or reducing of any carcasses or parts thereof upon the said premises since August 1, 1897.

The defendant *Schneidt* also denied that he had at any time since August 1, 1897, killed or caused to be killed any cattle, horses, etc., or that he had maintained or maintains any slaughter house upon said premises, but alleged that during said time no cattle, horses, sheep, or other animals whatever had been killed upon said premises, save and except two horses, which were killed by the officers of the health department of the city of Milwaukee, by being shot to death. He also denied that said manufactory had become or was a nuisance either to the public or any person residing on or being in its neighborhood, or that any offensive odor or noxious gas or effluvium had ever passed from his said premises into or upon the premises occupied by the plaintiff, or that any blood or offal whatever from dead animals or from said establishment had been deposited through a sewer or in any other way into the waters of the said river, or that the same were or are in any way polluted or rendered unwholesome or unfit for use by reason of any substance or substances coming into the same in any way from the said premises of the defendant *Schneidt*. The defendant admitted that the Menomonee river, at the point named, is a

small stream, sluggish in its movements when the water is low, as it is during most seasons of the year; that it flows through the city of Wauwatosa, and through part of the city of Milwaukee, and through the town of Wauwatosa, which is an organized town, containing more than 200 inhabitants, constituting a part of the county of Milwaukee, which county contains a population of over 100,000 people; and denied every allegation of the complaint save only such as had been expressly admitted.

It was alleged in the answer that the action was not brought or maintained by the plaintiff at his own instance or in his own behalf, but was brought and maintained for the benefit and at the expense of persons who had no interest in the questions raised in the suit, and that the plaintiff was an engineer in the employ of one Manegold, who was the maintainer of the action, and paid the expenses thereof for his own purposes or the purposes of persons other than the plaintiff, and brought the same at the instance and by the command of said Manegold, who was acting in the interest and on behalf of and as the agent of the Wisconsin Rendering Company, for the purpose of preventing the defendant from reducing such carcasses, to the end that the said city of Milwaukee might be compelled either to allow said carcasses to rot in its streets, or to renew its contract, or to make a new contract for the reduction of the same with the said rendering company.

Upon said verified answer and over thirty affidavits and all the papers and documents in the action, a motion was made to vacate the injunctional order, and require the plaintiff to give additional security as the court might deem just. These affidavits were in general to the effect that the business so conducted and carried on upon said premises was conducted at all times in a sanitary manner, and by means of an apparatus for that purpose, by which the reduction thereof was rendered inoffensive, and the process was elab-

orately described. And it was alleged that no animal matter during any of the said time had passed from said premises of the defendant into the river, and that no smell whatever had at any time come from the said river at the point where the sewer enters the same, or below that point, by reason of any discharge through the sewer mentioned; that at all times all the blood, etc., coming from said carcasses had been carefully collected, with the contents of the viscera therefrom, and had been caused by the defendant to be buried; and it was maintained that it was absolutely necessary for the health of the city that the carcasses of all animals within its limits should in some way be disposed of, so as to be rendered innoxious, and that the continuance of the injunction entailed upon the defendant a loss of income of at least $50 to $100 per day; that at no time since the 26th of August, 1897, had any offensive smell been produced by the defendant's premises, and gone beyond the limits thereof, through or on account of the treatment or handling of the said animals.

These affidavits were also supported and confirmed by affidavits, to the number of six or more, of various physicians then and for a long time past assistants to the commissioner of health of Milwaukee, and inspectors of the health department, who had visited and examined said defendant's premises, and who deposed that, in their judgment, the said establishment and premises of the defendant were in a sanitary condition, and that no noisome or noxious vapors or injurious substances proceeded therefrom or were cast upon the neighboring premises, and that outside of the building of defendant no unwholesome or unpleasant odors were discernible or could be detected along the line of said sewer, and that no decomposing or offensive substances flowed into or were deposited in the said Menomonee river from said establishment, and no offensive odors arise from said river at said point or from the banks of the same in said neighbor-

hood. In these affidavits the manner of disposal of said carcasses of dead animals was described and explained, and they were supported by the affidavits of twenty-six other deponents, who live adjacent to or in the immediate neighborhood of said establishment, to the effect that they had not since the 26th of August, 1897, smelled any bad odor or smell coming from said plant.

When the motion to vacate the injunction came on to be heard, the plaintiff moved to postpone the hearing until he could have the opportunity to take the deposition of the defendant *Schneidt* as an adverse party, to be used on the hearing of said application, and the motion to require the plaintiff to give additional security thereon; but plaintiff's counsel stated that he did not desire to use said examination on the question of the existence of a nuisance, but on the question merely whether the security given by the plaintiff on the injunction should be increased. The court ruled, in substance, that if, after argument, it should be advised that the preliminary injunction should be retained, the remainder of the motion would be continued, so that the plaintiff might use the examination of the defendant upon that branch of the case. The application to vacate the injunctional order was forced to a hearing and argued, and the court made an order vacating and dissolving the temporary injunction, from which the plaintiff appealed.

For the appellant there was a brief by *N. S. Murphey*, attorney, and *Wheeler & Perry*, of counsel, and oral argument by *N. S. Murphey*. They contended, *inter alia*, that the temporary injunction could not properly be dissolved until all of the defendants implicated in the wrong had answered. 2 High, Injunctions, § 1528; 1 Barb. Ch. Pr. 639; *Noble v. Wilson*, 1 Paige, 164; *Vandervoort v. Williams*, 1 Clark (N. Y.), 377; *Jones v. Magill*, 1 Bland (Md.), 190; *Smith v. Loomis*, 5 N. J. Eq. 60; *Johnston v. Alexander*, 6 Ark. 302; *Prickett v. Tuller*, 29 N. J. Eq. 154. The affida-

vit of one disinterested witness in support of the complaint will prevent a dissolution. Here there were nine affidavits. 1 Barb. Ch. Pr. 47; *Manchester v. Day*, 6 Paige, 295; 2 High, Injunctions, §§ 1509, 1512. The acts being prohibited by sec. 1418, R. S. 1878, without regard to their effect, otherwise than that they are illegal, followed by irreparable damage and destruction of a common right, themselves furnish complete authority for a court of equity to restrain their execution. 2 High, Injunctions, § 1236; *Christopher v. New York*, 13 Barb. 567; *Hays v. Jones*, 27 Ohio St. 218; *Davis v. Zimmerman*, 91 Hun, 489.

For the respondent there was a brief by *V. W. Seeley*, attorney, and *Charles Quarles*, of counsel, and oral argument by *Mr. Quarles*.

PINNEY, J. It is well settled that an interlocutory injunction is liable to be dissolved upon sufficient cause shown at any stage of the proceedings after the coming in of the answer. "And, in general, it may be said to rest in the sound discretion of the court to dissolve such an injunction upon the coming in of the answer denying the equities of the bill, or to continue it to a hearing upon the merits, if such a course shall seem best calculated to serve the ends of justice, and to protect the rights of all parties. A dissolution of an injunction after answer filed being, therefore, largely a matter of judicial discretion, appellate courts are averse to interfering with the exercise of such discretion." In some of the states it has been broadly laid down that an interlocutory or preliminary injunction may be dissolved at any stage of the cause, either before or after answer filed, or after demurrer to the bill; while in others the rule prevails that a motion to dissolve will not be entertained until after the coming in of the answer,— founded upon the ground, doubtless, that the plaintiff is entitled to the discovery which the answer may afford in support of the equity of the bill. High,

Injunctions, §§ 1467, 1468. Accordingly, where a bill of discovery also prays an injunction against a judgment at law, if the bill contains no allegations sufficient to entitle the complainant to a discovery, and no ground upon which the injunction can be sustained, a dissolution may be had upon motion without the answer of the party from whom the discovery is sought.

In the present case it is objected that it was error for the court to entertain and grant, as it did, the motion to vacate the injunction before the defendant city had answered. Like objection is made that the court erroneously compelled the plaintiff to go to the hearing of the motion to dissolve before the plaintiff could examine the defendant *Schneidt* as an adverse party, so that his examination could be used upon the hearing of the motion; but as the plaintiff's counsel stated that he did not desire to use such examination on the question of nuisance or no nuisance, but on the question merely whether the security given by the plaintiff on the injunction should be increased, the court required the hearing on the motion to proceed; stating that, if of opinion that the injunction should be retained, plaintiff might thereafter use such examination of the defendant *Schneidt* on the matter of the sufficiency of the security. This was a proper exercise of discretion, and there is nothing to show that the plaintiff was injured by it, or by having the motion to vacate heard before the defendant city had answered. The formal answer of the city under its corporate seal would be of little or no avail as a matter of discovery, and the answer of the defendant *Schneidt*, the only natural person defendant, is quite full, and seems to cover the entire case. We cannot see that the plaintiff has been prejudiced in the least by bringing to a hearing the motion to dissolve the injunction before the defendant city had answered.

The authorities show that whether a motion to vacate an injunction may be heard before every defendant has an-

swered is largely a matter of discretion, and that there is, in fact, no absolute and inflexible rule on the subject. Much depends upon the circumstances and the interest of the defendant who has not answered, and his relation to the controversy. *Minturn v. Seymour*, 4 Johns. Ch. 173; *Jones v. Commercial Bank*, 5 How. (Miss.), 43; *Rogers v. Tennant*, 45 Cal. 184; High, Injunctions, § 1468. It appears to be well settled that the injunction may be dissolved at any stage in the progress of the cause, either before the filing of the answer or afterwards, or after demurrer. It is largely a matter of judicial discretion, and, unless it appears that the discretion of the court has been abused, the action of the court will be sustained. In *Walker v. Backus Heating Co.* 97 Wis. 160, the rule in this state is stated thus: "The order which grants or dissolves an interlocutory injunction is a discretionary order, and will not be disturbed on appeal unless it shall appear to be an abuse of judicial discretion. It is a well settled rule of general application that when all the material allegations upon which the equities of the case rest are fully met and denied, without evasion or equivocation, by the answer or the affidavits upon which the motion to dissolve is based, the injunction will be dissolved. High, Injunctions, § 1505. It is necessary that such facts only as constitute the equity of the case be so denied. The motion may be based upon the sworn answer alone, or upon affidavits, or upon both the answer and affidavits. R. S. 1878, sec. 2781. On such motion the court must decide, upon the facts presented, whether the injunction should have been granted, and, in case of doubt, give the defendant the benefit of that doubt."

The action was brought to obtain a perpetual injunction against the defendants for the maintenance of a public nuisance, alleged to be especially injurious to the plaintiff. The entire equity of the case depends upon the question of nuisance. It is contended by the plaintiff that, as there were

nine affidavits on the part of the plaintiff supporting the allegations of the complaint, this fact should have prevented a dissolution, notwithstanding the showing made by the affidavits presented in support of the motion. This position is in direct conflict with *Walker v. Backus Heating Co.*, *supra*, and with the statute (R. S. 1878, sec. 2781), by which it is provided that the application to vacate or modify an injunction "may be made upon the papers on which the injunction was granted, or upon proofs, by affidavits or otherwise, on the part of the moving party. If the application be upon such proofs, but not otherwise, the opposite party may oppose the same by like proofs, in addition to those on which the injunction was granted." The parties in the present case respectively availed themselves fully of their right to produce affidavits for and against the motion. These affidavits consisted largely of matters of opinion in respect to whether the establishment maintained by the defendant *Schneidt* was a nuisance or not; but, whether of opinion or of fact, whatever was affirmed by the affidavits on one side was as certainly contradicted or refuted by the affidavits produced on the other. The practice of trying equity cases on the merits upon *ex parte* affidavits is certainly to be deprecated; but the only limit, under the statute, that seems to exist to the number of affidavits that may be produced in support of or in opposition to a motion to vacate an injunction, consists in the discretion of the court hearing the motion. As stated in the cases cited, whether the injunction ought to have been vacated or retained was a matter depending upon the sound discretion of the court; and, as it cannot be affirmed that such discretion in the present instance has been abused, the order vacating the injunction must therefore be affirmed, and the parties required to settle the question of nuisance by a more satisfactory method of a regular trial upon testimony given by witnesses in open court.

The plaintiff invokes the provisions of R. S. 1878, sec. 1418, in relation to the erection, maintenance, and removal of slaughter houses, providing that: "No person shall erect, maintain or keep any slaughter house upon the bank of any river, running stream or creek, or throw or deposit in such running stream any dead animal or any part thereof or any of the carcasses or offal therefrom into or upon the banks of any such river, stream or creek, which shall flow through any city or village, or erect, maintain or use any building for a slaughter house, within the limits of any village incorporated or unincorporated, or any organized town containing two hundred or more inhabitants, or at any place within one eighth of a mile of any dwelling house or building used as a place of business; and every person who shall violate any of the provisions of this section shall forfeit for each such violation not less than ten nor more than one hundred dollars; and the mayor of the city, president of the village, and the chairman of the town in which any such slaughter house is located, shall have power to, and shall cause the same to be immediately removed; and every such officer who shall knowingly permit any slaughter house to be used or maintained, contrary to the provisions of this section, shall forfeit not less than fifteen, nor more than fifty dollars. In any county containing a population of one hundred thousand or over, all the provisions of this section in relation to slaughter houses shall apply to all establishments and manufactories in which dead animals or any part thereof or any of the carcasses or offal therefrom are collected and converted into marketable products."

Whatever criticism may be made as to the validity of this statute, it is a sufficient answer to its application to the present case to remark that it is no part of the jurisdiction of a court of equity to enforce by injunction the criminal or penal statutes of the state, nor will it interfere for the prevention of an illegal act merely because it is illegal. In the absence

of any injury to property or property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral or illegal acts. High, Injunctions, § 20. Whether the acts complained of are followed by such consequences as to render them an actionable nuisance is the real question, in any event, whether forbidden by penal statute or not. Whether wrong and damages to the plaintiff so concur, under the circumstances stated, as to show a nuisance especially injurious to the plaintiff, which should be restrained, was the real question. Upon that question, the court, in the exercise of its undoubted discretion, found against the plaintiff, and vacated the injunction granted by the court commissioner.

In view of the facts presented by the record and the showing made, we cannot say that there was an abuse of judicial discretion, warranting the interference of this court on appeal from the order vacating the injunction.

By the Court.— The order vacating the injunction, appealed from, is affirmed.

---

99 214
106 489
106 490
106 494

99 214
110 [1]554
s40 LRA 837
49 LRA 725n
52 LRA 724n

99 214
114 613

MILWAUKEE COLD STORAGE COMPANY, Appellant, vs. DEXTER and another, Respondents.

March 4—April 12, 1898.

Corporations: Fraud by promoters: Brief on appeal.

1. One D., having purchased land, paid a part of the price, and bound himself to pay the balance and to build upon and carry on a certain business on the premises, organized a corporation to carry on that business, not having previously intended to do so, and sold the land to it at an advanced price. The subscribers for stock knew at what price it was to be purchased and had the means of knowing its value, but did not inquire what D. had paid for it, and were not influenced to purchase by any false statement or representation or any breach of duty or trust on his part. *Held,*

that the stockholders could not complain because of D.'s having charged the corporation more for the land than he paid for it. *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; *Franey v. Warner*, 96 Wis. 222; and *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, distinguished.

2. A statement in the prospectus for such corporation in the terms "Cost of ground, $40,000," cannot be construed as a representation that the land cost that sum to the stockholder who offered it to the corporation.

3. It cannot be construed as a fraud upon the corporation or upon the other subscribers that D., out of his own funds, paid to one of the subscribers a commission to induce him to subscribe or to procure others to do so, which would render D. and such other subscriber liable to the corporation for the profits made by them on the sale.

4. Neither was it a fraud upon the corporation that D., in order to induce his vendor, without whose consent he could not sell, to become a subscriber, personally paid him a sum of money.

5. D. did not, by purchasing land in his own name and offering to sell it to a corporation organized by him, become an agent or trustee of such corporation.

6. A brief in a case depending upon the evidence should, under Supreme Court Rule IX, merely state the leading facts and conclusions which the evidence establishes or tends to establish, with reference to the names of the witnesses and the places in the printed case where the evidence may be found.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This action was commenced February 29, 1896, to recover from the defendants, *Dexter* and *Godfrey*, $18,187.50, with interest thereon from February 24, 1893, and to have the same declared to be a lien upon their shares of stock in the plaintiff company, and that the same be sold to satisfy the amount so found due to the plaintiff from them, or, on default, their stock, or so much thereof as may be necessary to satisfy such decree, be canceled, and that the plaintiff have judgment against them for any deficiency. The defendants separately answered by way of admissions, denials, and counter allegations.

The cause having been tried by the court, the facts found or proved and admitted are in effect as follows:

On April 15, 1892, Lindsay Bros. had possession of the land in question, under a land contract from the Milwaukee Land Company. On that day the defendant *Dexter* applied to Lindsay Bros. for the purchase of the land. They at first asked $30,000 for the land, but finally agreed orally to take $22,500 on the conditions stated in a written contract to be drawn therefor. The defendant *Dexter* then paid Lindsay Bros. $1,000, as a part of such purchase price. On April 17, 1892, he paid them thereon the further sum of $5,000. On April 20, 1892, such land contract from Lindsay Bros. was drawn up and executed by them to the defendant *Dexter*. Said contract is to the effect that Lindsay Bros., for and in consideration of $22,500 to be paid by the defendant *Dexter* as thereinafter specified, and the keeping of other promises, agreements, and stipulations by him therein made and contained, thereby agreed to convey a good title to the defendant *Dexter*, by warranty deed or deeds, to the real estate therein described, and further agreed to procure the construction of a suitable switch for the line of the Chicago, Milwaukee & St. Paul Railway Company on the right of way belonging to the company, so that the center of the track would be six feet east of the east line of the land described, and suitable for receiving and shipping merchandise from the building or buildings to be erected on said land. That in consideration of such agreements the defendant *Dexter* did therein covenant and agree to purchase and pay for the land described $22,500, as follows, to wit: The $6,000 at the time of the execution and delivery of such agreement, and which had in fact already been paid, as mentioned, and $16,500 in six equal instalments of $2,750 each, payable on or before December 1 in each of the years 1892 to 1897, inclusive, with interest at six per cent. per

annum, payable annually, on the deferred payments; that the defendant *Dexter* did therein further covenant and agree that he would on or before December 10, 1893, improve the premises by erecting thereon substantial and new buildings, machinery, and outfits, and use the same until April 20, 1899, in conducting a cold storage business; that all such improvements should remain on the premises, and not be removed therefrom or destroyed until the final payment for the premises, and that he would promptly pay as so agreed, and would regularly pay all taxes and assessments, general or special, lawfully imposed upon the premises prior to the return thereof; that in case the defendant *Dexter* should fail to make the payments aforesaid, or any of them, punctually, or should fail to perform all of his agreements and stipulations aforesaid, strictly and literally (times of payment and performance being of the essence of the contract), then Lindsay Bros. were to have the right to declare the contract null and void, and all the rights and interests thereby created or then existing in favor of defendant *Dexter* should thereupon utterly cease and determine, and the premises, and the right to the possession thereof, should revert to and revest in Lindsay Bros. as absolutely, fully, and perfectly as if such contract had never been made; that the defendant *Dexter* did thereby covenant and agree that he would make no transfer of the contract, nor of his rights or interests in the premises, without the approval of Lindsay Bros.; that it was thereby further mutually covenanted and agreed that the covenants and agreements therein specified should be binding upon the successors, heirs, legal representatives, and assigns of the respective parties.

On April 20, 1892, the defendant *Dexter* entered into the possession of the real estate, and the several tenants occupying buildings on the premises thereafter attorned and paid rent therefor to him. The defendant *Dexter* was then, and

had been for a long time prior thereto, engaged in the business of cold storage warehousing at Whitewater, and the same had been very profitable. He was also the inventor of certain devices used in such business, and the owner of letters patent on the same, and had for a long time theretofore been engaged in the business of erecting and constructing cold storage warehouses, upon contract, for others. Such real estate was not purchased by the defendant *Dexter* for or on behalf of the plaintiff corporation, nor with the intention of turning the same over to, or disposing of the same in any manner to, the plaintiff or any corporation. He first conceived the idea of forming a corporation for the purchase of the land in question from himself, and the carrying on upon the land the business of cold storage warehousing, May 5, 1892; and prior to that date neither of the defendants did anything looking towards the formation of the plaintiff corporation, or any other corporation, and did not consult any person relative to the formation of the corporation, or ask any person to become in any way interested therein. The defendant *Dexter* so purchased the land from Lindsay Bros. for the purpose of building and operating thereon a cold storage warehouse himself; but after failing to dispose of some other property owned by him from which he hoped and expected to secure funds necessary for that purpose, he, on May 5, 1892, proposed to the defendant *Godfrey*, who carried on a large commission business in Milwaukee, and whose patronage of such cold storage warehouse would add much to the probable success of the enterprise, that a corporation be formed, with a capital stock of $100,000, to take from the defendant *Dexter* the land, at and for the sum of $40,000, and build and operate a cold storage warehouse thereon; that he (the defendant *Dexter*) would subscribe for $60,000 of such capital stock; that in case he (the defendant *Godfrey*) would give his own sub-

scription, or procure the subscription of other commission men, together with his own, to the remaining $40,000 in capital stock, he (the defendant *Dexter*) would pay him (*Godfrey*) for such services in obtaining such subscriptions, and also to induce the defendant *Godfrey* to become such stockholder and thus secure his valuable patronage for such warehouse business, the sum of $4,000. No part of the $4,000 was added to the purchase price which the projected corporation was to pay for the land, but was to be paid by the defendant *Dexter*, out of his own money, to the defendant *Godfrey*, for the consideration aforesaid; and the purpose thereof was to aid the projected business in the manner aforesaid.

After May 5, 1892, the defendant *Dexter* also solicited E. J. Lindsay, of the firm of Lindsay Bros., to subscribe for and take stock in the plaintiff corporation for the purpose of purchasing the land at $40,000. Said Lindsay subscribed for and agreed to take fifty shares of the stock and pay therefor $5,000. Some time after such subscription said Lindsay claimed that, under the circumstances of the recent sale of the land by Lindsay Bros. to the defendant *Dexter* at such reduced price, he thought it was unfair to charge him for his interest at so high a price. Thereupon the defendant *Dexter* thought he would make it right, and afterwards gave him his check for $550,— that is to say, to charge him for his interest at the rate of $30,000 for the land, the price first exacted by Lindsay for the land. Both the defendant *Godfrey* and Lindsay subscribed for stock in the plaintiff corporation prior to June 4, 1892.

Articles of incorporation of the plaintiff were executed May 7, 1892, and filed and recorded, as required by law, May 9, 1892. At the time the first meeting of the corporation was held for the purpose of organization (June 4, 1892), and prior to and at that time, the following persons had sub-

scribed to the stock of the corporation, and agreed to take and pay for the number of shares set opposite their names, as follows:

A. I. Dexter	500	shares	$50,000
E. R. Godfrey	160	"	16,000
E. R. Godfrey, Jr.	40	"	4,000
W. H. Stevens	20	"	2,000
I. P. Tichenor	20	"	2,000
N. L. Kneeland	20	"	2,000
G. C. Rogers	20	"	2,000
E. K. Dexter	50	"	5,000
E. J. Lindsay	50	"	5,000
Making an aggregate of	880	"	amounting to $88,000

Up to that time no other person had subscribed for such stock. Between May 7 and May 9, 1892, a prospectus of such proposed corporation was prepared by the defendant *Dexter*, to be presented to, and which was in fact presented to, each of the persons so subscribing for such stock, before making such subscription. Such prospectus stated, among other things, that the proposition was for the *Milwaukee Cold Storage Company* to have capital stock to the amount of $100,000; that the value of the capital stock to be so issued would be $55,000; that a mortgage bond would be given for $45,000; that the cost of the ground would be $40,000; that the cost of building and fittings would be $60,000.

Each one of the persons so subscribing knew that the land in question belonged to the defendant *Dexter;* that *Dexter* was not purchasing, and had not purchased, the land for the projected corporation. Each one of the foregoing persons signed the subscription to the stock with the understanding that, as to him, such property should be purchased by the plaintiff corporation from the defendant *Dexter* for $40,000, but without knowledge of, and without inquiry as to, what the property cost the defendant *Dexter*, except that the defendant *Dexter* and said Lindsay had such knowl-

edge, and the defendant *Godfrey* and said Lindsay each had knowledge of the payments to be made to him as aforesaid. Said *Godfrey* had reason to believe, and did believe, that the defendant *Dexter* was selling the land to the corporation for more than it cost him, though he did not know, and never inquired, what *Dexter* had paid, or agreed to pay, for the land, nor what profit he was making, and *Dexter* never told him.

At the first meeting, for the purpose of organizing the plaintiff corporation by the election of officers and the acceptance of stock subscriptions, June 4, 1892, there were present the subscribers for stock mentioned, and it was then and there voted that the plaintiff purchase the land in question for $40,000. The defendants *Godfrey* and *Dexter*, and also said Lindsay, with the other subscribers, attended at such meeting. Each of such nine subscribers subscribed with the understanding and agreement that the land in question should be bought by the plaintiff from the defendant *Dexter* for $40,000. Neither the defendants *Godfrey* or *Dexter* nor said Lindsay in any way acted for the plaintiff or its subscribers, as agent to negotiate or make the purchase of said land for it or them, except by joining in the vote aforesaid. Such purchase by the plaintiff of the land in question from the defendant *Dexter* was authorized by a resolution passed by its board of directors. At the time of the passage of such resolution and sale of the land, the defendants, *Dexter* and *Godfrey*, and said Lindsay, were acting directors, and then constituted a majority of such board. The defendant *Dexter* was then acting as president thereof, and the defendant *Godfrey* as the treasurer thereof. The defendant *Dexter* did not at any time disclose to the other subscribers what the land cost him, nor what profit he was making in turning the land over to the plaintiff, but never made to any of them any misstatement or misrepresentation whatever about the same.

The defendant *Godfrey* did not disclose to any of the other subscribers that he was to receive $4,000 from *Dexter*. Lindsay did not disclose to any of the other subscribers that he had received $550 from *Dexter*. Each of the subscribers, excepting *Dexter*, *Godfrey*, and Lindsay, was ignorant of the amount of profit made by *Dexter*, the money so agreed to be paid by him to *Godfrey*, and the rebate paid by him to Lindsay, but the land was a known piece of property in the city of Milwaukee, and each of the subscribers knew the price asked, and knew, or could have ascertained, the condition and value of the land, and each agreed that the said land be taken by such corporation at the price aforesaid, without regard to what it might have cost *Dexter*, and without regard to what it might have cost any other subscriber for his subscription to the capital stock of the corporation.

Subsequently to June 4, 1892, Carrie W. Thayer subscribed for twenty shares of such stock, F. W. Wyman subscribed for twenty shares, Thomas & Schaus subscribed for twenty shares, A. B. Meyer subscribed for twenty shares, and William Plankinton subscribed for forty shares, of the plaintiff's stock, which, with the 880 shares obtained on and prior to June 4, 1892, made 1,000 shares; being the whole capital stock of the corporation. The subscriptions after June 4, 1892, were obtained by *E. R. Godfrey*, and each one of the subscribers last referred to knew that the land in question had been purchased by the corporation for $40,000, before subscribing, and subscribed with that understanding and on that basis, and without being led or induced to do so by any false statement or representation whatever. There was no intention to defraud the plaintiff, or any of the subscribers to its capital stock, by the defendants, or either of them, in any or either of the transactions mentioned. All persons who subscribed for stock in the corporation did so without relying on what others were paying, or what the land had cost any purchaser prior to its purchase by the

corporation. No proof was offered by the plaintiff, nor is in any way before the court, that the land was worth less than $40,000 when it was bought by the corporation from *Dexter*, nor that at the time of the trial it was worth less than that sum.

On January 30, 1893, the Milwaukee Land Company conveyed the premises to Lindsay Bros. by deed dated on that day, reciting a consideration of $10,000, and the same was recorded February 16, 1893. Lindsay Bros. conveyed the same to the defendant *Dexter* by deed dated February 15, 1893, and recorded February 24, 1893, reciting a consideration of $25,000. The defendant *Dexter* and wife conveyed the same to the plaintiff by deed dated February 15, 1893, and recorded February 24, 1893, reciting a consideration of $40,000. The plaintiff corporation made calls on its subscribers to pay in their subscriptions to the capital stock,—one of ten per cent., June 4, 1892; one of twenty per cent., October 29, 1892; one of ten per cent., December 13, 1892; one of ten per cent., January 14, 1893; and one of ten per cent., May 6, 1893; making sixty per cent. in all,—and such calls were paid, and the plaintiff erected and completed a cold storage warehouse on the land in question, and began and was engaged in carrying on the business of warehousing thereon in May, 1893. The plaintiff had in January, 1893, procured a loan of $40,000, secured by mortgage on the land in question so improved, and out of the proceeds of the loan paid the balance due to the defendant *Dexter* on the land in question.

On May 17, 1893, and after sixty per cent. had been paid in on such capital stock subscription, one John A. Hill and his father, Robert Hill, began negotiations for the purchase of 350 shares of stock in the plaintiff corporation, and June 3, 1893, an arrangement was made whereby the defendants, *Dexter* and *Godfrey*, and also Thomas & Schaus, E. J. Lindsay, W. H. Stevens, and G. C. Rogers, relinquished each a

part of his subscription aforesaid, amounting to 350 shares in all, and said John A. Hill came in as a stockholder, although making no formal subscription, and paid into the treasury of the plaintiff at the rate of $102.50 per share for said 350 shares of stock, and received said stock from the plaintiff corporation; and subsequently the said John A. and Robert Hill purchased from the other subscribers aforesaid other stock in the plaintiff corporation, until said John A. and Robert Hill at the time of the trial owned all of the stock in the plaintiff corporation, except thirty shares owned by the defendant *Godfrey*, and 290 shares by the defendant *Dexter* and his wife. Part of the stock so acquired by John A. and Robert Hill was 130 shares, which they held as the transferees of the defendant *Godfrey*, 50 shares as the transferees of the said E. J. Lindsay, and 210 shares as the transferees of the defendant *Dexter*, and the remainder of the stock so held by John A. and Robert Hill was so held by them as transferees of the subscribers aforesaid, who acquiesced in the purchase of the property as stated. The shareholders of the corporation at the time this action was commenced, and at the time of the trial, were: *E. R. Godfrey*, 30 shares; the defendant *Dexter* and wife, 290 shares; and John A. and Robert Hill, 680 shares. By subsequent corporate action, without the consent of the defendants, the plaintiff corporation reduced its capital stock, first to $80,000, by making the par value of each share $80, instead of $100, and later, and since the commencement of this action, reduced its capital stock to $50,000, by making the par value of each share $50, instead of $80.

The $4,000 so paid by the defendant *Dexter* to the defendant *Godfrey*, and the $550 so paid by the defendant *Dexter* to Lindsay, were so paid and received, in good faith, out of the funds of the defendant *Dexter*, and not out of the corporate funds or property belonging to the plaintiff, and the payment thereof was fairly compensated by the advantage

derived by the corporation and its then subscribers on account of such payment, and there was never any agreement or representation to the said subscribers, or either of them, that they, or either of them, were getting their stock in the corporation upon the same terms as all the other subscribers, nor were there any misrepresentations whatever made to any of the subscribers, nor to the said John A. Hill, nor to Robert Hill, at the time he purchased it, in June, 1893, or prior thereto, or at any time; nor were the payments by *Dexter* to *Godfrey* or Lindsay, or either of them, or any part of either of them, added to the purchase price of said property paid by the plaintiff corporation, nor was the said purchase price in any way or to any extent increased or enhanced thereby; and there was no evidence before the court that the plaintiff corporation had suffered any damage or injury whatever by reason of any act or thing done by the defendants, or either of them.

As conclusions of law upon the facts stated, the court found that the plaintiff could not maintain this action, and that the defendants were entitled to judgment dismissing the complaint herein, and for their costs and disbursements, and ordered judgment to be entered accordingly.

From the judgment so entered the plaintiff brings this appeal.

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *Charles Quarles*. They argued that the defendant *Dexter* was bound, as a promoter, to state all the facts. Bishop, Contracts, § 660. Actual fraud resulted from defendants' acts, and it was immaterial that none was intended. *Chandler v. Bacon*, 30 Fed. Rep. 538. *Dexter* and his associates were liable as promoters. 2 Cook, Stock, § 651; 1 Thompson, Corp. § 415; *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; *Hebgen v. Koeffler*, 97 id. 313; *Erlanger v. New Sombrero P. Co.* 3 App. Cas. 1218, 6 Eng. Rul. Cas. 777. They were liable as trustees of the

corporation. *In re Taylor Orphan Asylum*, 36 Wis. 535; *Haywood v. Lincoln L. Co.* 64 id. 647; *Parker v. Nickerson*, 112 Mass. 195; *Michoud v. Girod*, 4 How. 503; *Bentley v. Craven*, 18 Beav. 75; *Franey v. Warner*, 96 Wis. 222.

For the respondents there was a brief by *Van Dyke & Van Dyke & Carter;* a separate brief by *Timlin & Glicksman*, attorneys for *Godfrey;* and oral argument by *W. E. Carter* and *W. H. Timlin.*

CASSODAY, C. J. The facts stated are either conceded, or found by the court to be true, and the evidence is sufficient to support the findings. Upon such facts, therefore, the rights of the parties must be determined. Counsel for the plaintiff seek to bring the case within the rulings of this court in *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345; *Franey v. Warner*, 96 Wis. 222; *Hebgen v. Koeffler*, 97 Wis. 313. In the first of these cases the rule of law applicable was tersely stated in a quotation from the opinion of a court in another jurisdiction, as follows: "A trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on the account of another what he sells on his own account; . . . and, if he does so, the *cestui que trust* or principal, unless, upon the fullest knowledge of all the facts, he elects to confirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit." 74 Wis. 320. In the second case cited it was held that the "promoters of a corporation are accountable to it for any profits which they may receive from a violation of their duty as such." In all of them the persons held liable were promoters of the corporation, or the contemplated corporation, in the purchase and sale of the lands, or agents or trustees of such corporation in making such purchase or sale, or both. This is not such a case.

The defendant *Dexter* had closed his contract for the purchase of the land from Lindsay Bros., and paid $6,000 of the purchase price thereon, more than two weeks before the time when anything was said about, or done towards, the formation of the plaintiff corporation. That contract bound the defendant personally to erect and construct the buildings, machinery, and outfits necessary for the cold storage business, and to operate the same for seven years, and to pay the balance of the contract price as agreed, and not to transfer the contract, nor his right in the premises, without the approval of Lindsay Bros. We must therefore consider the land as the property of the defendant *Dexter* at the time the formation of the plaintiff corporation was first contemplated by him. His original purpose of constructing such cold storage buildings, machinery, and outfits himself, and then to operate the same for the period mentioned, was apparently changed by extraneous circumstances into a purpose of doing the same through a corporation in which he and his wife should own at least a majority of the stock.

His prospectus for such corporation stated, "Cost of ground, $40,000." It is contended that this was a representation to the contemplated subscribers for stock that the land had actually cost him that amount. A prospectus is naturally supposed to be prospective in its application. In the instant case it was the summary or outline of the plan or scheme for the proposed cold storage undertaking. The $40,000 named was manifestly to be the cost of the ground to the proposed corporation, not the amount which it may have cost the defendant *Dexter*, or some prior purchaser.

It is contended that, because the defendant *Dexter* purchased the land of Lindsay Bros. for $22,500, it was only worth that amount. But Lindsay Bros. had other real estate in the vicinity, and the conditions exacted by them from the defendant *Dexter* in the contract, to construct and operate such cold storage plant thereon, may have been regarded as

a great advantage to them, and as a sufficient inducement to accept for the land $7,500 less than at first exacted. The location of the land may have been such as to make it of much more value for the purposes of such cold storage business than for any other use. There is no evidence in the record as to the value of the land at the time of the incorporation of the plaintiff, except such inferences as may be drawn from the contract price and the price exacted.

It is true that the defendant *Dexter* did not disclose to any of the subscribers to the stock in the plaintiff corporation the amount which he had agreed to pay Lindsay Bros. for the land, and none of them knew, except E. J. Lindsay, and the defendant *Godfrey* had reason to believe that he was to receive more from the corporation than he had agreed to pay; but none of them made any inquiry, and it does not appear that any false statement or misrepresentation was made by *Dexter* to any one. The land was open and visible, and well known to all the subscribers; and each knew the price which the plaintiff was to pay for the same, and each knew, or could have ascertained, the condition and value of the land at and prior to the time of subscribing for such stock. The defendant *Dexter* had large experience in the business of cold storage warehousing, and owned letters patent on certain devices used in such business, and manifestly believed it would become a profitable enterprise. Since the defendant *Dexter* had obtained the land, and paid more than one fourth of the purchase price, weeks before there was anything said or done, or apparently contemplated, about the formation of the plaintiff corporation, and since the several stockholders subscribed with such knowledge or means of knowledge in respect to the value of the land and the price the plaintiff was to pay for the same, and without being influenced by any false statement or misrepresentation, and without any breach of duty or trust on the part of the defendants or either of them, there seems to be no founda-

tion for claiming that the plaintiff, or any subscriber to its capital stock, was defrauded or injured, merely because the defendant *Dexter* personally paid to the defendant *Godfrey* $4,000, to induce him, as a commission man, to subscribe, or procure the subscription of other commission men, for the balance of the $100,000 capital stock in order that the plaintiff might secure the valuable patronage of such commission men in the proposed cold storage business; nor because the defendant *Dexter* personally paid to E. J. Lindsay, after his subscription to the stock, $550, in order to remove his apparent dissatisfaction for having sold the land so cheaply,—especially as the contract precluded *Dexter* from transferring the same to the plaintiff or any one, without the approval of Lindsay Bros.

The question recurs whether the plaintiff is entitled to recover from the defendants, or either of them, upon the facts stated. Certainly there is nothing said in any of the cases cited above to warrant a recovery in such a case as this. In fact, the intimation in some of those cases is strongly to the contrary. Thus, in *Franey v. Warner*, 96 Wis. 222, Mr. Justice MARSHALL said: "Cases cited, where a person sells his own property to a company in which he is interested, at an increased price, fairly and openly, free from representations that he is selling the property of another, have no application to this case." Numerous adjudications are there cited in support of that proposition, and it seems to be applicable to the case at bar. In the language of Mr. Justice SHARSWOOD in *Densmore Oil Co. v. Densmore*, 64 Pa. St. 49: "Any man, or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction."

The defendant *Dexter* was not the agent or trustee of the plaintiff or any one at the time he obtained the land of Lindsay Bros. *Id.* Neither of the defendants stood in any confidential relation to any of the subscribers to the capital stock until some step was taken towards the formation of the plaintiff corporation. These views are supported by *In re Cape Breton Co.* 29 Ch. Div. 795; *Ladywell Mining Co. v. Brookes*, 35 Ch. Div. 400; *S. C.* 17 Am. & Eng. Corp. Cas. 22. Thus, in the recent case in the house of lords the lord chancellor, HERSCHELL, said: "It is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what has been called the real price, or the true value. . . . I admit that there may be considerable ground for suspicion that the price was in excess of it. But, obviously, for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving what he claims, namely, a secret profit improperly made, that he should prove that there has been that excess which he alleges." *Bentinck v. Fenn*, 12 App. Cas. 659. There is nothing in the celebrated case of *Erlanger v. New Sombrero Phosphate Co.* 3 App. Cas. 1218, in conflict with the principles stated. That case is clearly distinguishable from the one at bar upon its facts, but the principles which govern this case are recognized in that. Upon the facts found or admitted, the trial court properly held that this action could not be maintained.

The brief and supplement on the part of the defendant *Dexter* cover 135 printed pages, and are in violation of the rules of this court. If the printed case is incomplete or inaccurate in any substantial particular (but not otherwise), the opposite party may serve a supplemental case with references to the record, as in the principal case, making the corrections; but no costs shall be taxed for the printing of any case or supplemental case failing to comply with the

rule. Rule VIII. "The brief of the appellant or plaintiff in error must contain a *concise* statement of (1) the nature of the action and the issues involved; (2) the result of the trial or hearing in the court below; (3) the several errors relied upon for reversal; (4) in cases depending upon the evidence, the leading facts or conclusions which the evidence establishes or tends to prove; (5) the principles of law applicable to the case, and the authorities in support of the same." Rule IX. "The leading facts or conclusions which the evidence establishes or tends to prove" does not mean a recital or restatement of the evidence, but merely that such facts or conclusions should be stated, with a reference to the names of the witnesses and the places in the printed case where the evidence which establishes or tends to prove such facts or conclusions may be found. The rule prohibits extended discussion upon a mere question of fact in any brief. To reprint in a brief what is printed in the case merely incumbers the record and increases the expense, without being helpful to the court. A party failing to comply with the rules takes the chances of losing costs. The defendant *Dexter* is only to be allowed for fifty pages of printed brief.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

As to the duties and liabilities of promoters to the corporation and to its members, see note to *Yale Gas Stove Co. v. Wilcox* (64 Conn. 101), in 25 L. R. A. 90.—REP.

KNOWLES, Respondent, vs. ROGERS, Appellant.

March 5—April 12, 1898.

Appealable order.

An order by the court, refusing to vacate a previous order made by a court commissioner in a proceeding under sec. 4096, R. S. 1878, that the defendant produce certain books and papers, and regulating

the examination of such books and papers, is neither an interlocutory nor a final order, nor one refusing, continuing, or modifying a provisional remedy, and it is not appealable under sec. 3069, R. S. 1878, as amended by ch. 380, Laws of 1897.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Appeal dismissed.*

Appeal from an order of the superior court of Milwaukee county refusing to vacate and set aside the order of Hugh Ryan, court commissioner, requiring the defendant to produce certain books and papers, or to regulate the time or manner of examining the defendant's books of account. The plaintiff commenced an action against the defendant by the service of summons, and gave notice of his examination otherwise than as a witness, under sec. 4096, R. S. 1878, having caused a subpœna to be served on the defendant to produce at the examination divers books of account, bought and sold cards, telegrams, tickets, and correspondence, relating to the transactions, kept by the defendant in his business as commission merchant or broker, so as to enable the plaintiff to prepare his complaint with sufficient accuracy to state his cause of action.

It appeared by the examination, so far as it progressed, that the defendant was unable to produce said books, telegrams, trading cards, and correspondence, as they were then in Chicago; that certain telegrams, trading cards, and correspondence were in Milwaukee; but the defendant, under advice of counsel, declined to produce any telegrams or correspondence between him and third persons having no relation to the claim made by the plaintiff, and asked the commissioner to rule that their specification in the subpœna did not require him to produce any correspondence between himself and any other person relating to his general business, or relating to the business of third persons with the defendant, or to any business other than business transacted for the plaintiff, if any such there was. During the prog-

ress of the examination, the commissioner made the following order or ruling: "I will hold this examination open until 2 o'clock this afternoon, and direct that at that time *Mr. Rogers* produce all the correspondence, bought and sold cards, or books which are in the city of Milwaukee and under his control or in his possession mentioned in the subpœna, which in any way relate to the account of the plaintiff with the defendant, or to any business dealings between them, directly or indirectly."

The defendant obtained an order from the judge of the superior court requiring the plaintiff to show cause why the order to produce certain books and papers should not be vacated and set aside, and why a reasonable time should not be allowed the defendant within which to produce said books and papers, after said defendant had had them examined himself by experts, and why the books and papers to be produced should not be distinctly specified, and the defendant have such other relief as might be just, but made no application to limit the scope or extent of the examination. Upon the hearing, the court made an order denying the application of the defendant, from which order the defendant appealed.

The cause was submitted for the appellant on the brief of *Timlin & Glicksman*, and for the respondent on that of *Winkler, Flanders, Smith, Bottum & Vilas.*

PINNEY, J. The order in question does not grant, refuse, continue, or modify a provisional remedy, and is clearly not appealable, under subd. 3, sec. 3069, R. S. 1878, as amended by ch. 380, Laws of 1897, which includes within the category of appealable orders an order which "grants, refuses, continues, or modifies a provisional remedy." The order appealed from does not continue the proceedings, and no motion was made to set aside, dismiss, or discontinue them. The order to show cause required cause to be shown why

the order made by the commissioner during the examination, "requiring the defendant to produce certain books, papers, etc., should not be vacated and set aside, and why a reasonable time should not be allowed the defendant within which to produce said books and papers *after* said defendant had had them examined himself by experts, and why the books and papers to be produced should not be distinctly specified." The purpose of the order to show cause was to regulate the method of conducting the examination before the commissioner. It was neither an order refusing, continuing, nor modifying a provisional remedy. The case clearly falls within the decision in *Stuart v. Allen*, 45 Wis. 158–162. The ruling of the superior court is neither an intermediate nor a final order, properly so called. It was merely a direction in regard to the manner of conducting the examination pending before the commissioner, and in which the proceedings were to some extent discretionary. The motion was not made on the ground of any deficiency in the affidavit accompanying the notice of examination and subpœna. The defendant appeared and submitted to examination without making any such objection, and no such point appears to have been raised on the order to show cause. The case of *Cleveland v. Burnham*, 60 Wis. 16–20, is substantially to the same effect as *Stuart v. Allen*, and is decisive on the question of the appealability of the order. We are clearly of the opinion that the order in question is not within the category of appealable orders, and the appeal must therefore be dismissed.

By the Court.— Appeal dismissed.

LEDERER and others, Respondents, vs. ROSENTHAL, Appellant.

March 5—April 12, 1898.

Admissions in pleading as evidence: Attachment for debt not yet due: Affidavit and undertaking: Nonresidence: Waiver of tort.

1. Admissions in the complaint in an attachment case that the debt sued on is founded upon an express contract and not yet due are *prima facie* competent evidence of those facts as against the plaintiff, upon a motion to set aside the attachment.
2. An affidavit for an attachment in an action to recover a debt not yet due is fatally defective if it fails to state, as required by sec. 2731, S. & B. Ann. Stats., that "the debt is to become due."
3. An attachment in an action upon a debt not yet due is authorized by statute only on the conditions that the requisite affidavit be made, and that an undertaking be given in three times the amount demanded by the plaintiff.
4. Mere nonresidence of the defendant is not a ground for an attachment in an action for a debt not yet due.
5. An attaching creditor cannot, by disaffirming an express contract for the sale of goods on sixty days' credit on the ground that it was induced by the false representations of the defendant, waiving the tort into which his claim is thus converted and suing on an implied contract for money due, evade the provisions of sec. 2731, S. & B. Ann. Stats., requiring the attachment bond, in a case where the debt is not due, to be in three times the amount demanded.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The defendant appeals from an order made in this action by the circuit court, denying her motion to set aside and vacate the attachment issued therein, and continuing said attachment proceedings, and giving the plaintiffs leave to amend their affidavit for attachment by setting forth that a cause of action sounding in tort existed in favor of the plaintiffs against the defendant at the time of the commencement of the action and issuing of the writ. The parties are nonresidents. September 29, 1897, the plaintiffs began their

action against the defendant, and, under attachment proceedings therein, seized a quantity of cloaks, capes, etc. The original affidavit for attachment was to the effect that the defendant was indebted to them in the sum of $1,304 upon *express* contract, and that the defendant was not a resident of this state. The undertaking for the writ was in the sum of $250 only, and was conditioned as in the case of a debt already due. It was not conditioned in three times the sum demanded, as required by the statute in case of a demand not yet due. S. & B. Ann. Stats. sec. 2731, subd. 2.

The verified complaint, as a cause of action, alleged the sale by the plaintiffs to the defendant of goods, wares, etc., at the agreed price of $1,303.28, July 1, 1897, upon a credit of sixty days. The verified bill of particulars of the plaintiffs' claim against the defendant, as set forth in their complaint, shows that the goods were sold on credit on various dates from July 7, 1897, to September 25, 1897, and that, of the entire amount, only $2.98 had become due prior to the commencement of this action, and that $1,300.30 was at that time *not yet due.* The complaint sets forth that the defendant solicited the plaintiffs to sell and deliver said goods to the defendant for $1,303.28, *on a credit of sixty days*, with a fraudulent design to cheat and defraud them, and, as an inducement to so sell said goods, represented that the defendant had assets of the value of $5,000, and was not indebted to any one for merchandise or borrowed money; that, relying on said representations, the plaintiffs sold and delivered said goods to the defendant at said prices; that said representations were in fact false and fraudulent, as the defendant well knew,—and further alleged that the defendant did not intend to pay for said goods, but to obtain the same by said means, and cheat and defraud the plaintiffs. Plaintiffs further alleged that, upon obtaining knowledge of the falsity of the representations, they elected to waive the contract, and to hold the defendant upon an implied promise, through

and under the fraudulent transaction aforesaid, to respond to and pay the plaintiffs the aforesaid price of said goods so obtained by said defendant, and converted by her as aforesaid; and they conclude with a demand for judgment for $1,303.28. An amended or substituted affidavit for attachment was subsequently filed, and the only ground for the attachment alleged therein was the nonresidence of the defendant. In this affidavit it was alleged that the indebtedness was founded upon *implied* contract.

Upon all the records and papers in the action, and particularly on the amended affidavit for the writ of attachment and undertaking annexed to said writ, the complaint in the action, and the bill of particulars served by plaintiffs, the defendant gave notice of a motion to vacate and discharge the writ of attachment on the ground that it appeared upon the face of the affidavit and undertaking in said attachment, and the complaint of the plaintiffs therein, and the bill of particulars served by plaintiffs, that the debt upon which the action was predicated was at the time not yet due, and that said undertaking was conditioned in the amount of $250 only as and for a debt due, and upon the ground that it appeared that it was not conditioned in three times the amount demanded, and the further ground that there was no valid ground for issuing the writ of attachment in the action. At the hearing the court ordered that the defendant's motion to vacate and discharge the writ of attachment be denied, and that the attachment proceedings be continued, and the plaintiffs have leave to amend their affidavit for attachment, setting forth that a cause of action, *sounding in tort*, existed in favor of the plaintiffs against the defendant at the time of the commencement of the action and the issuing of the writ. From this order the defendant appealed.

Charles L. Aarons, for the appellant.

For the respondents there was a brief by *Bloodgood, Kem-*

per & Bloodgood, attorneys, and *W. P. Bloodgood*, of counsel, and oral argument by *W. P. Bloodgood*. They argued, *inter alia*, that only the attachment papers could be considered on a motion to vacate an attachment. The right to an attachment is absolute if the affidavit required by the statute is made. *Mayhew v. Dudley*, 1 Pin. 95; *Davidson v. Hackett*, 49 Wis. 186. If the complaint does not state a cause of action the defendant can demur. The complaint in this case states a tort, and the defendant by demurring admits the tort. The plaintiff has a right to waive that tort and sue upon an implied contract. *Norden v. Jones*, 33 Wis. 600; *Keyes v. M. & St. P. R. Co.* 25 id. 691; *Elliott v. Jackson*, 3 id. 649, 655; *Grannis v. Hooker*, 29 id. 65; *Smith v. Schulenberg*, 34 id. 41, 50; *Wells v. Am. Exp. Co.* 49 id. 224; *Graham v. C., M. & St. P. R. Co.* 53 id. 473, 481. Waiving the tort leaves the parties in the same position as if no express contract had been made. *Roth v. Palmer*, 27 Barb. 652; *Wigand v. Sichel*, 33 How. Pr. 174; *Willson v. Foree*, 6 Johns. 110; *Butts v. Collins*, 13 Wend. 154; *Camp v. Pulver*, 5 Barb. 91.

PINNEY, J. The amended or substituted affidavit for the attachment wholly failed to state any cause or ground for attachment for a debt not already due. The only ground alleged was the nonresidence of the defendant, which, in the case of a debt not already due, will not suffice. S. & B. Ann. Stats. sec. 2731. The plaintiffs' duly verified complaint shows that the goods constituting the cause of their demand were sold July 1, 1897, on a credit of sixty days, and the original affidavit for attachment states that their said demand is founded on express contract. The verified bill of particulars delivered under their complaint November 5, 1897, shows that the goods in question were sold on credit, on dates named therein, running from July 7, 1897, to September 25, 1897, amounting to $1,303.28, and that $1,300.30 was

not yet due. Apparently, the sale or contract of July 1st was for a sale of goods on credit, to be delivered from time to time. The action was commenced and the attachment was taken out upon a demand not due at the time, but the affidavit failed to state, as the statute required (S. & B. Ann. Stats. sec. 2731), "that the debt is to become due." The amount of the debt was sworn to be $1,300, as near as may be, over and above all legal setoffs, and that the same is due on express contract. This statement must be regarded, we think, as an affirmation of a then existing contract of sale, and that it was by *express* contract.

The plaintiffs' complaint and the bill of particulars delivered under it, for the purposes of this motion, must be regarded as *prima facie* evidence against the plaintiffs of the facts thus stated. They constitute a statement of the nature, character, and extent of their claim, and are in the nature of solemn judicial admissions by the plaintiffs, and may properly be regarded as *prima facie* competent evidence against them, when relevant upon a trial, or as a foundation for a motion. *Cook v. Barr*, 44 N. Y. 156. This was so regarded, in respect to a motion to set aside an attachment, in *Hubbard v. Haley*, 96 Wis. 578, without special discussion of the point; but we regard the position as correct, and important to the due and convenient administration of justice. It was properly shown, therefore, that the debt in this case was for goods sold by *express* contract, and that the debt was not due when the action was commenced and the attachment was executed. The plaintiffs had brought their action, and obtained an attachment, for a debt not then due, and without complying with the statute in such case, requiring the usual undertaking to be conditioned in three times the amount demanded. S. & B. Ann. Stats. sec. 2731.

October 1st the plaintiffs filed another affidavit, with a notice annexed, that it was "by way of amendment of, and a substitute for, the original affidavit annexed to the writ of

attachment." This was to the effect that the defendant was indebted to the plaintiffs in the sum of $1,304, and that the "same is due upon *implied* contract," and, as a ground for attachment, alleged that the defendant was not a resident of the state. There is no new fact brought forward to show that any part of the debt was, or had become, due. In *Gowan v. Hanson*, 55 Wis. 344, it was held that the statute only authorizes the commencement of an action on a debt not due, for the purpose of an attachment, in the cases specified, "and that the same proceedings in the action should be had, and the same affidavit required, as in actions upon matured demands, except that the affidavit shall state that the debt 'is to become due,' provided that an undertaking on the part of the plaintiffs be given, with sufficient surety, conditioned, etc., in three times the amount demanded. . . . To our minds, it is perfectly clear that this statute only authorizes the commencement of an action on a debt not due, for the purpose of an attachment, on condition that the requisite affidavit is made, and the proper undertaking executed and delivered. The giving of an undertaking for three times the amount demanded is as essential to the right to maintain the action as the making of the affidavit. Both things are absolutely necessary and requisite, where the debt is not due, and the omission of either is fatal to the action. This is the plain meaning of the statute, and any other construction would do violence to its language. . . . There is nothing obscure or doubtful in the law. The language in which the legislature have spoken is plain and unambiguous." *Hubbard v. Haley*, 96 Wis. 578. "The giving of the bond is not essential to the issuance of the writ, but is to its execution, and the maintenance of the proceedings." R. S. 1878, sec. 2732. The substituted affidavit did not supply any defect in the original, but, so far as showing any cause for an attachment is concerned, it was evidently defective, in that the only cause stated is the mere nonresidence of the defend-

ant, which is not a valid ground for an attachment for a debt not yet due. The court cannot dispense with a strict performance of the terms upon which attachments are allowed. It is familiar law that the statute authorizing the issuing of an attachment must be strictly pursued, and no presumptions will supply the defect where it is departed from. Proceedings by attachment are among the most summary and stringent known to the law, and they should be confined strictly within the limits of the statute by which they are authorized, and more especially so when resorted to in a case where the debt is not yet due. *Pratt v. Pratt*, 2 Pin. 398; *Lathrop v. Snyder*, 16 Wis. 293.

The original affidavit for attachment charged, also, as a ground therefor, that the defendant fraudulently contracted the debt or obligation respecting which the action was brought, although the debt was not then due. Had the plaintiffs given the requisite undertaking in such a case, conditioned in three times the sum demanded, it would seem that no objection to the validity of the attachment upon the face of the proceedings would have existed. It is true that the plaintiffs would have been bound, on a traverse, to prove the truth of the ground thus laid for the writ; and in any of the different forms in which they urge their demand, which was substantially the same demand upon express contract, though not then due, upon which the plaintiffs commenced their action, they would doubtless be bound, as a condition of recovery, to prove the fraud on which they rely. Having obtained their attachment without complying with the terms of the statute in respect to an indispensable condition of granting it, particularly in respect to the undertaking in three times the amount demanded, they proceeded to adapt the condition and character of their demand, if possible, to the proceeding instituted, in order to justify and sustain it, without giving the required security. First, it is said, they disaffirmed the express contract of sale, for

the alleged fraud, and claimed thereby that their demand was converted into a claim founded upon a *tort*, and then they elected *to waive the tort*, so that in this manner they change a demand on express contract, not due, to one on an implied contract, which was already due, so that the undertaking in the sum of $250 would, it is said, be a sufficient security for the attachment, in any of the various aspects in which they present their claim to sustain such attachment. The contention of the plaintiffs results in a manifest evasion and perversion of the statute, whereby it is sought to sustain an attachment issued without authority of law, and without complying in the particular case with the terms of the law under which alone it could be issued. We cannot sanction such a manifest evasion of the important statutory provision for security upon issuing attachments, particularly in a case where the debt is not due.

The defendant's motion to set aside and vacate the attachment issued should have been granted, and it was error to order said attachment proceedings to be continued.

By the Court.— The order of the circuit court appealed from is reversed, and the cause remanded with directions to dismiss and vacate the attachment.

---

99 242
109 362

BARTH, Receiver, Appellant, vs. KOETTING and others, Respondents.

March 23 — April 12, 1898.

Banks: Loans to cashiers: Resulting trusts in land: Fraudulent conveyances.

1. The cashier of a going bank may lawfully, acting in good faith and with the consent of the stockholders and directors, borrow money from such bank with which to buy land, and no trust in the land will arise from such transaction in favor of the bank. CASSODAY, C. J., dissents.

2. In order to render such a transaction fraudulent as to subsequent creditors of the bank, it must have been entered into with the intent to contract debts in the future and defraud the holders of such debts. CASSODAY, C. J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: WARHAM PARKS, Judge. *Affirmed.*

This is an action in equity by the receiver of an insolvent state banking corporation to have the title to a certain farm, now held by the defendants *Rogers* and *Mann*, adjudged to be held in trust for the plaintiff, as receiver, and to compel a conveyance of the same to the receiver; also, to compel an accounting for the rents and profits thereof, and to set aside a mortgage placed thereon by *Rogers* and *Mann*, owned by the defendant *Annie R. Ball.*

The facts appearing upon the trial were not materially in dispute, and were substantially as follows:

The South Side Savings Bank was a state banking corporation, organized in 1868, and did business up to the 21st day of July, 1893, when it closed its doors insolvent, and three days later the plaintiff was appointed receiver. It did a large and apparently successful business. Its capital stock was only $25,000, and during the entire time G. C. Trumpff was president and the defendant *Koetting* cashier, each owning one half the capital stock, there being no other stockholders.

On the 21st of September, 1880, the bank purchased a judgment of foreclosure upon the farm in controversy, and, for convenience, took the assignment of the judgment in the name of *Koetting*, the cashier. The land was sold by the sheriff upon the judgment August 1, 1881, and bid in by *Koetting* in his own name and in his own behalf, pursuant to an agreement theretofore made between *Koetting* and Trumpff, by which it was agreed that *Koetting* should take the land and become the debtor of the bank for the purchase money, $6,500, it being also agreed between *Koetting*,

Trumpff, and one Kopmeier (father-in-law of *Koetting*) that a certain open account standing on the books of the bank, in favor of Kopmeier, amounting to more than $6,500, and in which *Koetting* had an interest, should remain in the bank as security for the loan until it was paid. *Koetting* took the deed of the land, and placed it on record, and soon after went into possession thereof by his tenants, and has ever since, to the knowledge of Trumpff, openly claimed title thereto and made large improvements thereon, until it came into the hands of *Rogers* and *Mann*. The open account aforesaid thereafter remained in the bank to an amount always greater than *Koetting's* debt for the land, and, at the time of the failure of the bank, amounted to about $8,000, of which $6,000 was the property of *Koetting*, as between him and Kopmeier. Said account still stands on the books of the bank to the credit of Kopmeier, and no claim has ever been filed in the receivership matter therefor, nor any dividend paid thereon, because the personal representatives of Kopmeier (now deceased) have recognized and consented to the aforesaid agreement.

In August, 1893, the defendants *Rogers* and *Mann* brought an action against *Koetting* to recover about $9,000 deposited by them in the bank, on the ground that such deposit was induced by fraudulent representations by *Koetting* as to the solvency of the bank, and attached the land in question. They recovered judgment against *Koetting* in this action in September following, and the land was sold upon execution under the judgment in November to the defendants *Rogers* and *Mann*, for the full amount of their judgment. January 31, 1894, *Koetting* and his wife quitclaimed the premises to *Rogers* and *Mann;* and in November, 1894, *Rogers* and *Mann* mortgaged the same to the defendant *Annie R. Ball*, to secure payment of $7,000 then borrowed of her, she having no knowledge of any claim on the land by the receiver.

It does not appear that any of the creditors of the bank

now existing were such in August, 1891. It further appeared that *Koetting* was indebted to the bank in August, 1881, to an amount exceeding $50,000, and in later years largely increased such indebtedness, and that the accounts were very loosely kept, *Koetting's* checks being continually carried in the cash drawer as cash to a large amount. The bank was insolvent in 1881, and remained so thereafter until the failure, although it had done a large business, and was apparently prosperous up to a time shortly before its doors closed.

Upon these facts, the circuit court concluded that there was no fraud in the transaction, and that any claim of the bank was barred by the ten-years statute of limitations, and dismissed the complaint on the merits, and the plaintiff appeals.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*. They argued that the defendant *Koetting*, as cashier of the bank, was a trustee for it and held to a much greater degree of scrupulosity in regard to the interests of the bank than other people. Morse, Banks (2d ed.), 197. He paid nothing for the property he assumed to appropriate. The arrangement he made for payment to the bank was by parol and not binding. A dishonest appropriation of the property of the bank by the cashier was void as to subsequent creditors, at least where future credits were contemplated. *Day v. Cooley*, 118 Mass. 524; *Case v. Phelps*, 39 N. Y. 164; *Savage v. Murphy*, 34 id. 508; *Woolstone's Appeal*, 51 Pa. St. 452; *Ridgeway v. Underwood*, 4 Wash. C. C. 129, 137; 8 Am. & Eng. Ency. of Law, 751–2. The cashier took the assignment of the judgment as trustee for the bank, and his purchase at the sale did not change the title but merely ripened it into another form. His trusteeship has never been repudiated. The bank paid subsequent taxes on the land. The cashier, being the agent of the bank, could not acquire title to its assets by adverse possession. *Williams v. Page*, 24 Beav.

654; *Williams v. McKay*, 40 N. J. Eq. 189; *Hun v. Cary*, 82 N. Y. 65. The fact that the bank was insolvent at the time of the transaction made the cashier a trustee for its creditors. *Haywood v. Lincoln L. Co.* 64 Wis. 639; *Ford v. Plankinton Bank*, 87 id. 363.

For the respondents there was a brief by *Quarles, Spence & Quarles*, a brief in reply by *Miller, Noyes, Miller & Wahl*, attorneys for *Rogers* and *Mann*, and oral argument by *Geo. P. Miller* and *Geo. Lines*.

WINSLOW, J. The facts are simple. Trumpff and *Koetting* were the sole officers and stockholders of the bank, and the bank owned a foreclosure judgment. When the land was about to be sold under the judgment, both agreed that *Koetting* should buy the land, and that the bank would become his creditor for the purchase price upon the security of Kopmeier's open account with the bank, Kopmeier assenting thereto. There is no evidence that *Koetting* was not amply responsible for the loan at that time and for a long time afterwards. There is no doubt but that, if a stranger had bought the land, the bank might have extended credit to him, as it did to *Koetting;* and the transaction would have been perfectly valid, even though the purchase price might never have been paid. In the absence of statutory prohibition, a cashier may borrow money in good faith of his bank, with the consent of the managing body of the corporation. 1 Morse, Banks (3d ed.), § 173. This is what *Koetting* did in this case. With the consent of all the stockholders and directors, he bought the land, and became the debtor of the corporation for the purchase price. We do not perceive how the corporation itself could afterwards disaffirm the transaction when all who were interested authorized it with knowledge of the facts, and when it does not appear that the transaction was even unwise. The cashier is not a legal trustee. He occupies a position of trust and confidence to-

wards his bank, and is held to a high degree of diligence in performing his duties; but he may deal with his bank with consent of the board of directors or other managing body of the corporation. Morse, Banks, *supra*. He may not obtain a preference for himself if the corporation be insolvent, but there is no principle of law which prohibits him from borrowing money of the corporation in good faith while it is a going concern, with the consent of the board of directors. *Hinz v. Van Dusen*, 95 Wis. 503.

If the transaction was a lawful one when made, it follows necessarily that no trust arose in favor of the bank upon the land. This was not a case where the alienee took a conveyance in his own name "without the knowledge or consent of the person paying the consideration," nor was it a case where the alienee, "in violation of some trust," purchased lands with the money of another. R. S. 1878, secs. 2077–2079.

There being no ground of complaint on behalf of the bank, and no trust in the land having arisen in its favor, the only remaining question is whether there is anything in the transaction rendering it void as to the present creditors of the bank. The relation between a bank and its depositors is simply that of debtor and creditor, and not that of trustee and *cestui que trust;* nor did the fact that the bank was insolvent turn its assets into a trust fund, so long as it was a going concern. *Ballin v. Merchants' Exch. Bank*, 89 Wis. 278. It is therefore simply a question whether the transaction was fraudulent as to subsequent creditors. In order to be such, it must have been entered into with the intent to contract debts in the future, and defraud the holders of such debts. *Second Nat. Bank v. Merrill*, 81 Wis. 142. There is no evidence here justifying the conclusion that there was any such intent. The bank did a large business for thirteen years after the transaction in question, and there seems to be no reason to believe that either Trumpff

or *Koetting* contemplated failure at the time of nor for many years after this transaction.

The judgment of the circuit court was right.

By the Court.— Judgment affirmed.

CASSODAY, C. J.. dissents.

WING and others, Respondents, vs. WADHAMS OIL & GREASE COMPANY, Appellant.

March 23 — April 12, 1898.

Contract of sale: Construction of terms.

A provision in a contract for the sale of goods to be delivered at different times, that "if, during the deliveries on this contract, the price should be below the price herein named, we agree to rebate such difference on deliveries so affected," is to be construed as meaning by the words "the price," when first used, "the market price."

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. C. Winkler.*

For the respondents there was a brief by *Tarrant, Kronshage, McGovern & Dielmann,* and oral argument by *Theodore Kronshage.*

CASSODAY, C. J. During the times mentioned, the plaintiffs were copartners doing business in New York, and the defendant was a Wisconsin corporation, doing business in Milwaukee. This action was commenced October 6, 1896, to recover $508.28, with interest from November 20, 1895, for certain goods sold and delivered by the plaintiffs to the

defendant upon an express written contract entered into, after some correspondence between the parties, September 13, 1894, to the effect that the plaintiffs had on that day sold to the defendant "600 drums of 'solvay,' seventy per cent. and, or seventy-four per cent. caustic soda for delivery, fifty drums per month, January to December, 1895, both inclusive; price 1.80 cents per pound for sixty per cent., delivered in Milwaukee, invoice weights and tares. Terms cash within sixty days from date of each delivery, or less one per cent. for prompt cash, sellers' option. . . . Each delivery to be treated as a separate sale. If during the deliveries on this contract *the price* should be below *the price* herein named, we agree to rebate such difference on deliveries so affected." The defendant answered by way of admissions, denials, and counter allegations, and a counterclaim for $800 by way of rebates for excessive price charged by the plaintiffs, under the last clause of the contract quoted. The cause was thereupon referred to a referee to hear, try, and determine, and at the close of the trial thereof the referee reported his findings of fact and conclusions of law, which, after being modified by the court, were, in addition to the facts stated, to the effect that, prior to November 20, 1895, the plaintiffs delivered to the defendant all the caustic soda mentioned in the contract, and the defendant received the same and paid therefor, except a balance on the last shipment of $508.28; that at no time during the deliveries on the contract was the market price of caustic soda below the price therein named; that by order of the court such report of the referee, so modified, was confirmed, and judgment thereon ordered in favor of the plaintiffs for $508.28, with interest from November 20, 1895, and costs. From the judgment entered thereon accordingly the defendant brings this appeal.

It is contended that the defendant is entitled to a rebate by virtue of the stipulation in the contract, because the plaintiffs, September 15, 1894, made a contract with B. J.

Johnson & Co. of Milwaukee, similar to the contract with the defendant, except that the plaintiffs were to supply their "entire consumption of caustic soda from Feb. 1 to Dec. 31, 1895, . . . taking the goods in not less than car-load lots," upon thirty days' notice to the plaintiffs; "price 1.75 per pound for sixty per cent., delivered in Milwaukee;" provided that "if, during the deliveries on this contract, our [the plaintiffs'] price should be below price herein named, we are to rebate such difference on all deliveries so affected." As a matter of fact, the written contract which the plaintiffs at first proposed to make with the defendant contained, in the clause for a rebate, the same words, "our price," as in the Johnson contract, but September 15, 1894, the defendant returned the same to the plaintiffs, with the word "our" stricken out, and the word "the" put in its place; and the plaintiffs consented to such modification. It is true, as contended by the defendant, that, if the contract had remained as originally written, there could be no contention that the words "our price" meant the market price. Counsel insist that the defendant suggested the change so as to protect it "not only against prices which might be made by the plaintiffs, but by any one else as well." If that was the purpose, apt words should have been employed to secure that purpose. The words "the price," as used, naturally refer to some known or ascertainable price — some standard of value. The word "price" is defined as "the sum or amount of money, or its equivalent, which a seller asks or obtains for goods in market." "The exchangeable value of a commodity." Cent. Dict. "The amount at which a commodity is valued or sold in the market. The market price,— as the price of wheat." Standard Dict.

To say that the term "the price," as used in the contract, is not the market price, but some specific price, though secret and unknown to any person except the contracting parties, is to distort its ordinary meaning. We must hold that, as

used in the contract, it means the market price. With this construction, it is, in effect, conceded that the defendant made no case for a rebate, and hence took nothing by its counterclaim.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

SCHUMAKER, Respondent, vs. HEINEMANN and others, Appellants.

99 251
102 222
104 317

99 251
106 16
f106 618

99 251
d107 240

99 251
53 LRA 42n
53 LRA 78n

March 23 — April 12, 1898.

Special verdict: Submission of issues: Contract of employment: Grounds for terminating: Damages.

1. Sec. 2858, R. S. 1878, entitles a party to an action to a special verdict on demand therefor at the proper time, but the duty of framing the questions covering the issues made by the pleadings is solely for the court.
2. If the questions submitted to the jury cover all the issues, the refusal to submit questions covering the same issues, or any one of them, in a different form, or refusal to submit questions covering mere elements of such issues, is not error.
3. Where an employer, for breach of duty, terminates a contract of employment with his employee, especially if the employment be one requiring the exercise of judgment and discretion, unless such breach be such as to evince moral turpitude or manifest injury to the employer's interests, it does not *per se* constitute a legal justification for the employer's conduct, and the issuable fact, therefore, under such circumstances, is not whether there was a breach of duty, but whether there was a breach of duty constituting reasonable ground for terminating the contract of employment.
4. Where a contract of employment has been unjustly terminated, the employee is entitled to compensation for such damages as the employer might reasonably have anticipated would result to his employee by the discharge. If such damages consist of profits lost, and the evidence furnishes reasonable data upon which to compute them, such lost profits are a proper measure of damages and are recoverable.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Action for damages for breach of contract. The complaint sets forth by appropriate allegations that plaintiff was employed by defendants as a traveling salesman for the year 1894, his compensation to be nine and one-half per cent. for all goods sold by him of certain classes, and five per cent. for other goods, he to pay his own expenses; that before the year expired, defendants discharged the plaintiff without any just cause therefor. The damage claimed was the amount plaintiff was prevented from earning under his contract by reason of the discharge.

Defendants answered admitting the contract of employment and the discharge, and pleaded in justification that plaintiff was guilty of having injured the business of the defendants by increasing orders given by customers, also by falsely representing to one customer that plaintiff had been ordered not to sell to such customer. The answer also set forth, as a counterclaim, damages for profits on goods that might have been sold to the customer, which were lost through the false representations of the plaintiff.

The evidence on the part of the plaintiff tended to show that he was damaged to the amount recovered, on the basis of the aggregate percentage on the goods he might have sold had he not been discharged. The evidence in justification of the discharge tended to show that the reason given therefor, at the time it occurred, was that plaintiff had collected two accounts and retained the same instead of remitting to the defendants. There was evidence on the subject of falsification of orders. The evidence to sustain the counterclaim was rejected by the court. There was evidence on the part of plaintiff in rebuttal of that in justification of the discharge.

The jury found specially on the controverted issues as follows:

"(1) Plaintiff was not guilty of such misconduct in respect

to collecting and retaining collections as to justify his discharge.

"(2) Plaintiff was not guilty of such misconduct in dissuading and preventing persons from buying goods of defendants as to justify his discharge.

"(3) Plaintiff was not guilty of such misconduct in falsifying orders as to justify his discharge.

"(4) We assess plaintiff's damages by reason of his discharge at $640."

Exceptions were taken to instructions given to the jury and to refusals to instruct as requested by defendants' counsel, also to refusals to submit questions requested by such counsel, and such motions were made and exceptions taken to rulings thereon as to preserve for review the subjects discussed in the opinion. Judgment was entered on the verdict in favor of the plaintiff, and defendants appealed.

For the appellants there was a brief by *Nath. Pereles & Sons*, and oral argument by *Guy D. Goff*.

For the respondent there was a brief by *Timlin & Glicksman*, and oral argument by *Nathan Glicksman*.

MARSHALL, J. Defendants' counsel demanded a special verdict in a form suggested by them, and it is assigned as error that the demand was not complied with. Sec. 2858, R. S. 1878, secures to a party desiring a special verdict the right thereto, but the duty of framing the questions is solely for the court. The only legitimate purpose of suggestions from counsel, as to what particular questions shall be submitted, is to direct the attention of the court to the issuable facts upon which the controversy depends. If the verdict does not cover all the issues essential to a determination of the case, no judgment can properly be rendered upon it, but if it does cover such issues, no error can be successfully assigned because the form for the questions, suggested by counsel, was not adopted, or because further questions were requested and refused.

Complaint is made of the form of the questions adopted by the court, covering the alleged breaches of duty on the part of plaintiff, relied upon to justify his discharge. It is said, in substance, that the form of each question did not call for a finding as to a particular controverted breach of duty, but as to whether it occurred under such circumstances as to furnish reasonable ground for terminating the contract of employment, as, for instance, appellants urge that the court should have required the jury to find whether plaintiff retained collections when it was his duty to return the same; that such was the issuable fact; that the element added by the court, of whether collections were improperly retained so as to justify the discharge, was improper, the theory of counsel being that the added element made the jury pass on a question of law instead of one of fact. In that, counsel is in error. If the evidence had been to the effect that the plaintiff embezzled money belonging to his employers, or retained money of theirs under circumstances evidencing moral or legal wrong, or showing conduct manifestly injurious to their business, that would have constituted legal justification for the discharge, and there would have been no question for the jury in regard to it. But the fact of the retention of the money was admitted, coupled, however, with a claim, and evidence tending to support it, that no wrong was intended, or any embarrassment occurred thereby to defendants' business; that it was done in accordance with the previous course of dealing between the parties, from which plaintiff honestly supposed, and had reason to suppose, that defendants would permit such conduct. On that state of the case, the real issuable fact was, not whether there was a breach of duty under the circumstances, but whether such breach constituted justifiable ground for the discharge. It might have been better to have divided the question into the elements of whether there was a breach of duty, and whether, under the circumstances, it constituted justifiable ground for terminating the contract of

employment, but the two elements are so essentially tied together as to really make but one issuable fact; so the court was justified in framing the question as was done.

It is not for every breach of duty that an employer is warranted in putting an end to a contract of employment before the appointed time. In a controversy over such a matter, especially where the employment is of a business nature, requiring the exercise of judgment and discretion, the breach of duty is not *per se* a legal justification for a discharge of the employee, unless such breach evidences moral turpitude, or the conduct is manifestly injurious to the employer's business. So, where the question of the breach itself is undisputed, but the evidence leaves it in doubt as to whether there was any wrong intended, or any real injury inflicted, upon the employer's business, whether it constituted reasonable ground to discharge the employee is always a fact to be found by the jury. Wood, Master & S. § 110; *Shaver v. Ingham*, 58 Mich. 649.

What has preceded applies to all of the questions covering the alleged breaches of duty upon which appellants relied. The questions were framed substantially alike and fully covered the whole subject of controversy.

It is further contended that the verdict is contrary to the evidence. No reason is perceived for disturbing the ruling of the trial court on that ground, under the rules governing the subject.

A further claim is made on exceptions to the judge's charge and to refusals to instruct the jury as requested, that the court adopted a wrong rule of damages, which was the contract percentage on what goods plaintiff might have sold had he continued in defendants' employ. The theory of defendants' counsel is that such rule looks to the loss of profits, which were too conjectural to be ascertained with reasonable certainty. True, the determination of what sum of money will cover damages of that nature is always at-

tended with considerable uncertainty, and, as this court has frequently observed, the adoption of that as the measure of recovery in any case is liable to operate injuriously and unjustly. At the same time it may be said that to refuse to apply the rule in every case would lead to frequent violations of that natural justice upon which the recovery of damages for wrongs is supposed to be grounded. So it is well established that loss of profits, where there are some substantial data to determine them from, is a proper measure of damages. If it were not so, manifestly, many cases would arise where breaches of contract obligations would be without any remedy at all, by compensation in damages.

Few better illustrations of that can be found than *Treat v. Hiles*, 81 Wis. 280, where plaintiffs were entitled, under their contract, to one half the profits of operating a stone quarry, so long as it could be profitably worked. After the making of the contract and before any profits were earned, defendant terminated the contract and sold the quarry without the consent of the plaintiffs. Several years afterwards plaintiffs prosecuted an action to recover their damages. There was evidence tending to show the amount of profits earned in working the quarry by the purchaser for three years prior to the trial, and on that evidence, under the instructions of the court, the jury determined that the profits covering the time prior to the trial, and for four years thereafter, could be determined with reasonable certainty, and assessed the same accordingly. The judgment rendered on the verdict was affirmed on appeal, this court observing, in substance, that, manifestly, the case was a proper one according to all the authorities, or at least the great majority of them, for assessing damages on the basis of lost profits; that of course the amount could not be determined with certainty, but that the same elements of uncertainty inhere in the assessment of damages in other classes of actions; that all the jury could do was to assess damages according

to their best judgment, based on the testimony and the evidence of what the quarry made for the owner for several years; that such evidence furnished data sufficient to enable the jury to apply the rule adopted by the trial court.

There are many other cases in this court that might be cited to the same effect, establishing the rule here in accordance with the law generally, that where the profits lost are such as the parties, at the inception of the contract, had in contemplation, and the person guilty of the breach of it must reasonably have anticipated would result therefrom to the other party, and there is evidence sufficient to furnish a legitimate basis for their determination, by the exercise of sound judgment on the part of the jury, they constitute a proper measure of damages and are recoverable.

The evidence in this case shows that plaintiff worked for defendants in the same business, over a large part of the territory covered by his contract, for three years before the year in question. It shows the general course of trade from month to month through the year, the total sales for 1893 month by month, and the total sales during the year 1894 up to the time of the discharge. All of such evidence was competent to go to the jury on the question at issue, and made a case warranting the application of the rule under discussion.

Some other questions are discussed in the briefs of counsel, all of which have been examined, but none of them appear to be of sufficient significance to call for special treatment in this opinion. The record does not disclose any reversible error. It follows that the judgment must be affirmed.

By the Court.—So ordered.

99 258
113 549

VOGT, Appellant, vs. THE CITY OF MILWAUKEE, Respondent.

March 24—April 12, 1898.

City ordinance fixing hours of labor: Extra pay for extra hours: Estoppel.

1. The effect of a city ordinance which fixes eight hours as a full day's work for city employees is to give such employees an option either to refuse to work over hours, or to demand extra pay for work over that time; but in order to entitle them to recover extra pay for work done over time there must have been a previous agreement therefor.
2. Where a city ordinance fixing eight hours as a full day's work for city employees provided that no city official should employ workmen overtime unless upon the recommendation and order of the health commissioner, *held*, that one who entered the employment of such city without any express agreement as to his wages or his hours of work, and without any action on the part of the health commissioner, and for the first forty-three days worked eight hours per day, and during the remainder of the year worked three shifts of eight hours each in every two days, and received and accepted his wages at the same rate per day for all the days he was employed, upon pay rolls signed by him which stated the whole number of days, without protest to any official having authority to act in the matter, must be deemed to have estopped himself from afterward claiming payment for the extra hours so worked by him.

APPEAL from a judgment of the superior court of Milwaukee county: FRANK M. FISH, Judge. *Affirmed.*

Plaintiff was employed as quarantine guard by defendant's health commissioner. Such employment commenced on June 17, 1894, and continued, with the exception of brief intervals, from month to month, until May 17, 1895, without any express agreement as to wages. His duties were to guard certain houses, in which the inmates were supposed to be infected with smallpox, and to enforce quarantine regulations. At first, and until August 1, 1894, three guards were assigned to each house; the guards remaining on duty on eight-hour

shifts. On the date last mentioned one of the guards was withdrawn, and the remaining two guards continued guarding the house, working as before, so that each guard would be on duty three shifts of eight hours each every two days. Upon the theory that eight hours constituted a day's work, the plaintiff claims to have put in 1,096 hours' (or 137 days') overtime during his employment. Pay rolls were made out in the office of the health commissioner, certified to by him, and audited by the comptroller; and, upon approval by the council, city orders were drawn to the different persons named. In each of these pay rolls the plaintiff's name appears, and against which is noted the actual number of days worked, at the rate of $2.22 per day. The pay roll was signed by the plaintiff, and a city order for the amount specified therein was delivered to him. Plaintiff collected his pay according to the pay rolls, from time to time, without protest, except that when he received his first payment he spoke to the inspector, Mr. Curtis, and to the secretary of the health department, about it. "I asked them whether this was the full time, and I said that I first only worked eight hours, and later worked twelve hours, so I had overtime coming; and Mr. Diercks told me that they could not do it just now, but they would do it later on." After a full hearing of the evidence, the court directed a verdict for defendant. From the judgment entered thereon the plaintiff appeals.

E. M. McVicker and *Lynn S. Pease*, for the appellant, among other things, argued that the city ordinance fixing the hours of labor constituted an offer on the part of the city which it had authority to make, and became a part of the contract with its employees. *People ex rel. East Saginaw S. Mfg. Co. v. Board of State Auditors*, 9 Mich. 327; *Hartman v. Greenhow*, 102 U. S. 672; *Hall v. Wisconsin*, 103 id. 5; *Poindexter v. Greenhow*, 114 id. 270; Cooley, Const. Lim. 330, note; Story, Const. § 1391; *Fletcher v. Peck*, 6 Cranch,

87; *Fisk v. Jefferson Police Jury*, 116 U. S. 131; *Koch v. Milwaukee*, 89 Wis. 220; *Miller v. Milwaukee*, 14 id. 642; *Reif v. Paige*, 55 id. 496, 503.

For the respondent the cause was submitted on the brief of *Howard Van Wyck*, city attorney, and *C. H. Hamilton*, special assistant.

BARDEEN, J. An ordinance of the city of *Milwaukee*, so far as applicable to this case, is substantially as follows: Eight hours shall constitute a full day's work for city employees who work, and are paid therefor, by the day only. No city official shall employ workmen to work overtime unless such overwork be first recommended by the health commissioner. All bills for overwork performed must be accompanied by an order of the health commissioner, giving reason why such overwork was necessary. This ordinance was in force during the time plaintiff was in the city's service. At the time the plaintiff entered into the employment of the city, nothing was said as to the rate of wages, or as to the number of hours that should constitute a day's work. At first, and for about thirty days, he worked eight hours daily, and thereafter, without protest, what was equivalent to twelve hours a day. He was kept at work whenever his services were needed, receiving his pay monthly at the rate of $2.22 per day. It is insisted that the ordinance mentioned entered into and became a part of the contract between the parties, and that thereby the city became bound to pay the plaintiff the amount specified per day for each eight hours' service. It will be observed that the ordinance does not attempt to fix the wages that shall be paid the city employees, or to fix any limits or conditions as to overtime, except that it shall be recommended and certified to by the health commissioner.

Statutory provisions similar to the ordinance in question are in force in a number of states, and the same question

here presented has received the attention of the courts. The matter was quite fully discussed in *McCarthy v. New York*, 96 N. Y. 1, and the conclusion there arrived at meets with our complete approval. It was said, in effect, that the object of the statute in establishing a limitation on the hours was to confer a benefit upon the classes protected, but that it did not make labor beyond the statutory time illegal, or require compensation to be made therefor unless it was provided for in the contract of employment; that it was not the intent of the act that two statutory days' labor should be crowded into one calendar day, or to give the price of two for one calendar day's labor. So when the exigencies of his employment, or the requirements of his employer, call upon the laborer for a greater number of hours of labor than those specified in the statute, it is optional with him either to refuse to perform them, or to insist, as the condition of their performance, upon the payment of extra compensation for the extra work, but in the absence of such agreement there was no right conferred to demand extra compensation. A similar construction was given to a law of Connecticut in *Luske v. Hotchkiss*, 37 Conn. 219. See, also, *Brooks v. Cotton*, 48 N. H. 50; *Averill v. U. S.* 14 Ct. Cl. 200.

As regards the plaintiff's employment by the city, there could not be an express contract to pay for eight hours' work, and an implied contract to pay for overtime or extra work. The work was all done under one contract of employment, and plaintiff might lawfully have quit after eight hours' work had been performed, and would have been entitled to pay accordingly. The evidence utterly fails to show any agreement as to overwork. The provision of the ordinance that workmen should not be employed to work overtime, except upon recommendation of the health commissioner, has some significance. The city charter provides that the comptroller of the city shall be the auditing officer, and that all claims and demands against the city shall be

audited and adjusted by him before they are allowed by the common council. It may well be claimed that the recommendation required should be of such a character as to carry knowledge to the comptroller that overwork had been required. But there is no claim in this case that a recommendation was so made; nor is there any evidence, that we can discover, that plaintiff ever brought his claim for overtime to the knowledge of the health commissioner. It is true that he testifies that he spoke to Mr. Curtis, who was inspector, but just what he said to him does not appear. He also spoke to the secretary of the board. But neither of these officers had any authority in the premises. It is not claimed that either of these officers had any authority to fix the amount of plaintiff's compensation, or to bind the city by any agreement as to overtime.

After the hours of plaintiff's service had been lengthened, he continued to draw his pay, without a word of protest except as before stated. In performing his work for the city, he was chargeable with notice of the powers and authority of its officers and agents, and he was bound to govern himself accordingly. For a period of at least ten months he continued to draw his pay, signing the pay rolls, receiving his orders, and cashing the same, without a suggestion that he was not fully satisfied therewith. Pay rolls were made out from a record kept in the commissioner's office, which showed the exact time plaintiff was on duty, and were certified to by the commissioner, and approved by the comptroller. A year and a half afterwards, plaintiff sues for overtime, upon the technical ground that eight hours constitute a day's work, and claiming that during all these months his pay has been but a fragment of the amount his due. The law will not tolerate any such claim. In absence of an express contract — and none is claimed — as to overtime, the fact that the pay rolls were made out, and his wages paid him, at a given rate, as effectively notified him

that his compensation for the time in service was the rate so specified as if he were formally notified. *Miller v. U. S.* 14 Ct. Cl. 200.

The alleged protest to the inspector and to the secretary of the board was not a protest to any officer of the city, such as would relieve plaintiff from the operation of the law of estoppel. It is perfectly evident from the situation that, had the proper city officials had notice that overtime was claimed, the plaintiff's services would either have been dispensed with, or a definite arrangement made. The testimony of Mayor Koch shows that $1.50 was the amount usually paid per day for unskilled labor, and, when the comptroller approved and the council allowed the pay rolls at $2.22 per day, it might well have been understood that plaintiff was being paid in full for his labor. It is true that courts are disinclined to enforce estoppels unless they can be subordinated to principles of equity. But this seems clearly to be a case where the rule should be invoked. The absence of an express agreement, the failure to make a proper protest, the payment of what seems to be the usual wages for the actual time in service, the acceptance of such payments for a long period of time, are all circumstances that speak loudly against the plaintiff's claim. The law which allows contracting parties, through the medium of an express contract, to fix in advance the value of a service to be rendered, also allows them to fix the value, in cases of implied contract, after the service has been rendered. It may as well be fixed by acts of the parties as by express agreement. Here it seems certainly to have been fixed by acts of the parties, and the plaintiff cannot now be permitted to dodge or escape the legal effect of his conduct.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

99 264
199 271

99 264
110 [1]383

99 264
113 [3]678

KRUCZINSKI and others, Respondents, vs. NEUENDORF and wife, imp., Appellants.

March 24 — April 12, 1898.

Cloud on title: Equitable relief: Remedy at law: Pleading: Parties.

1. Owners of the legal title to land, though not in possession, may maintain an action in equity, independent of the statute, to remove clouds from the title.
2. Owners of land, who have been deprived of possession under a void decree and fraudulent conveyances, which constitute clouds upon their title, have no such adequate remedy at law as will preclude them from maintaining an equitable action to remove such clouds and recover possession of the land.
3. A probate decree, which is void because entered without notice to or the appointment of guardians for the infant heirs of the decedent, and which declares certain adult heirs to be the sole heirs of such decedent, constitutes a cloud upon the title of such infant heirs, and they can maintain an action to recover possession of their interest in the land and to have their title cleared of the clouds raised by such decree and by subsequent conveyances.
4. One who once held the title under such decree, but has since conveyed all his interest to another, is not a necessary party defendant to the action by such heirs.
5. Under sec. 2647, R. S. 1878, heirs of a decedent who have been deprived of their interests in his lands when infants by a void decree of a probate court, entered without notice to them or the appointment of guardians for them, and by subsequent conveyances, may join an equitable action to set aside such decree and conveyances as clouds upon their title, with a legal action to recover possession of their interest in the land, together with rents and profits for the use thereof, since all such causes of action arise out of the same transaction and are connected with the same subject matter.
6. An action for those purposes is not one for partition, and the complaint need not conform to sec. 3102, R. S. 1878.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling the demurrer interposed by the appellants to the complaint, which alleges,

in effect, that Simon Kruczinski died intestate December 25, 1882; that at the time of his death he resided in Milwaukee, and was the owner in fee and possessed of the real estate therein described; that said intestate left, him surviving, his widow, Katharine, and eight children, as his only heirs at law; that four of them, who are not parties to this action, were more than twenty-one years of age, and the other four, who are plaintiffs in this action, were then less than twenty-one years of age, and two of them are still infants and appear by their guardian herein; that said estate has never been administered; that no proceedings have ever been had for the appointment of an administrator of said estate, and none has ever been appointed, and no settlement thereof has ever been made; that January 1, 1888, the widow, Katharine, was married to one Joseph Weisbrod; that June 17, 1893, she died at her home in Milwaukee; that, during the time she and Joseph lived together as wife and husband, they conspired together to cheat, wrong, and defraud the plaintiffs in this action, who were then infants, out of the lands described, and to that end said Katharine falsely and knowingly petitioned and represented to the county court of Milwaukee county that the four adult children of said intestate who are not parties to this action were the only heirs at law of said Simon, deceased; that she intentionally and wrongfully suppressed the existence of the plaintiffs herein, and concealed their relationship to the deceased, and their interest in the real estate described, from the knowledge and consideration of the county court; that the plaintiffs had no legal guardian and no guardian *ad litem*, and were entirely ignorant of the proceedings and the nature thereof; that no personal notice of the proceedings was ever given to or served upon the plaintiffs, or any of them, and that they were not in any manner represented in the proceedings; that March 13, 1889, such proceedings were had in the matter of the estate of Simon that, by means of the false and fraudu-

lent representations so made to the county court, said Katharine obtained from that court, and caused to be recorded in the register's office, a judgment and final decree of the county court, wherein it was ordered, adjudged, and decreed that the four children not parties to this action were the sole heirs at law of the said Simon, and were the owners in fee simple of the real estate described, subject to the dower of the said Katharine, when she well knew, as the facts were, that the plaintiffs were also the children of the said Simon by her, the said Katharine, and his heirs at law, and that they had been fraudulently and wrongfully omitted from the statement of the heirs of said Simon in the said judgment and decree; that January 22, 1889, said Katharine and Joseph Weisbrod obtained from the adult heirs of said Simon, not parties to this action, a quitclaim deed of the land described, running to themselves, and recorded February 8, 1889, reciting a consideration of $160; that the plaintiffs were entirely ignorant of the execution and delivery of that deed, and did not consent thereto nor join therein.

The complaint further alleged that August 17, 1889, the said Katharine and Joseph conveyed the premises described to the defendant *John F. Neuendorf*, subject to a mortgage for $900, by warranty deed recorded August 19, 1889, when they all well knew, as the facts were, that the plaintiffs in this action owned the undivided one-half interest in the lands described, which could not be so conveyed; that *John F. Neuendorf* had for several years resided a near neighbor to the said Simon, and was well acquainted with all his children, and that such fraudulent and false judgment and decree were so obtained with the knowledge, consent, and procurement of the said *John F. Neuendorf*, and under his special advice and direction; that *John F. Neuendorf* and wife remained in possession of said premises under said deed until January 16, 1890, when they conveyed by warranty deed, to the defendants John and Sophie Kulka, the east

half of the land described, and recorded the same, which deed recited a consideration of $1,000, and since that time John and Sophie Kulka have been in possession thereof; that the plaintiffs are the owners in fee, by inheritance from their father, of an undivided one-half interest in and to the lands described, and are entitled to the possession of the same, together with the rents and profits thereof, which were of the value of $200 per year for each and every year during the time; that February 11, 1892, the defendants John and Sophie Kulka made, executed, and delivered to the defendant the Skarb Poliski Mutual Loan & Building Society a certain mortgage upon said land to secure the payment of $500, six years after date, with interest at seven per cent. per annum, which mortgage was recorded February 12, 1892; that May 10, 1894, John and Sophie Kulka made, executed, and delivered to the defendant loan and building society a certain other mortgage upon said land to secure the payment of $100 one year after date, with interest, payable quarterly at seven per cent. per annum, which mortgage was recorded May 11, 1894.

The complaint prays judgment that so much of the judgment and final decree of the county court as ordered, adjudged, and decreed, in effect, that the four children not parties to this action were the sole heirs at law of said Simon and the owners in fee simple of the real estate described, subject only to the dower of Katharine, be set aside as false, fraudulent, and void; that the plaintiffs herein be adjudged to be the children and heirs at law of the said Simon, and entitled to the possession of an undivided one-half interest in the land described from and after August 17, 1889; that both of the mortgages described be declared null and void, so far as the interests of the plaintiffs in this action are concerned, and that their interests may be released from the liens and incumbrances of said mortgages; and that the plaintiffs may have and recover of and from the defendants *John F. Neuendorf*, John Kulka, and Sophie Kulka $1,500

for their undivided one-half interest in the rents and profits; and for general relief, with costs and disbursements.

J. C. Officer, for the appellants, argued, *inter alia*, that an action for partition cannot be maintained under the complaint because it does not in its allegations conform to sec. 3102, R. S. 1878. Ejectment will not lie by plaintiffs as tenants in common against their co-tenants. *Davis v. Lottich*, 46 N. Y. 393; *Carle v. Wall* (Ark.), 16 S. W. Rep. 293. In an action to set aside the decree of the county court for fraud, Weisbrod, the person who aided the adult heirs in procuring it and took title under them, is an indispensable party defendant. *Crites v. Fond du Lac Co.* 67 Wis. 236; *Douglas Co. v. Walbridge*, 38 id. 188; *Post v. Adams*, 39 Fla. 207; *Alexander v. Davis*, 42 W. Va. 465; *Sage v. Mosher*, 28 Barb. 287; *Gray v. Schenck*, 4 N. Y. 461. The complaint is bad for misjoinder of causes of action. *Hiles v. Johnson*, 67 Wis. 517; *Lee v. Simpson*, 29 id. 333; *Kewaunee Co. v. Decker*, 30 id. 624. The plaintiff has an adequate remedy by application to the county court to set aside its own decree. *Meyer v. Garthwaite*, 92 Wis. 571; *McMillen v. Mason*, 71 id. 405; *Hawley v. Tesch*, 72 id. 299; *Kegler v. Prien*, 62 id. 248, 250. The complaint does not allege fraud, and only partial relief could be granted under it. *Sheppard's Ex'r v. Starke*, 3 Munf. (Va.), 29–40.

For the respondents there was a brief by *John C. Keefe* and *John S. Maxwell*, and oral argument by *John C. Keefe*. They contended, among other things, that the plaintiffs had no adequate remedy in the county court. Even if that court could set aside its own decree after so great a lapse of time, it could not if such revocation would disturb rights which have become vested by the statutes of limitation. *Estate of Leavens*, 65 Wis. 440. Nor could it remove the clouds caused by subsequent conveyances.

CASSODAY, C. J. The contention that the complaint does not conform to sec. 3102, R. S. 1878, is without significance,

since this is not, and does not purport to be, an action for partition.

1. One ground of demurrer is that there is a defect of parties defendant in omitting to make Joseph Weisbrod a party defendant. It is true the quitclaim deed from the four heirs, not parties to this action, ran to Katharine and Joseph Weisbrod, but they both conveyed all their right, title, and interest in and to the land in question to the defendant *John F. Neuendorf*, nearly eight years before the commencement of this action. No relief is prayed against Joseph Weisbrod. He has no interest in the land nor the controversy, within the meaning of the statute. R. S. 1878, sec. 2610. He neither has nor claims an interest in the controversy adverse to the plaintiffs, and he is not a necessary party to a complete determination or settlement of the questions involved in this action. R. S. 1878, sec. 2603. We must hold that there is no defect of parties by reason of such omission.

2. It is contended that several causes of action have been improperly united. But the statute expressly provides that the plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, where they arise out of the same transaction, or transactions connected with the same subject of action. R. S. 1878, sec. 2647. The subject of the action is the land. Upon the death of the intestate, the land in question descended, subject to his debts and the rights of his widow, in equal shares to his eight children. R. S. 1878, sec. 2270; *Jones v. Billstein*, 28 Wis. 221; *Marsh v. Waupaca Co.* 38 Wis. 250; *Jones v. Graham*, 80 Wis. 11; *Root v. McFerrin*, 75 Am. Dec. 49. The undivided one-half of the land so descended to the plaintiffs. There is no question of any debts of the intestate here involved. The rights of the widow terminated on her death. The action is to remove clouds fraudulently placed upon the undivided one-half of the land so vested in the plaintiffs, December 25, 1882, when they

were all infants. The deeds and mortgages here sought to be set aside are, respectively, upon the east half of the land of which the intestate died seised, and which is the only part of the land involved in this action. The several causes of action alleged all belong to one of the classes mentioned in sec. 2647, R. S. 1878, and affect all the parties to the action, and do not require different places of trial, and are stated separately, and hence satisfy the conditions of that section. We must hold that there is no misjoinder of causes of action. *Bassett v. Warner*, 23 Wis. 673; *Watson v. M. & M. R. Co.* 57 Wis. 339; *Ellis v. N. P. R. Co.* 77 Wis. 114.

3. Another ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. This certainly cannot be maintained. *Hawley v. Tesch*, 72 Wis. 299; *S. C.* 88 Wis. 213; *Lamberton v. Pereles*, 87 Wis. 449. It is well settled that one having the legal title to land, though not in possession, may, independently of the statute, maintain a bill in equity to remove a cloud from his title. *Pier v. Fond du Lac*, 38 Wis. 470; *Smith v. Sherry*, 54 Wis. 128; *Smith v. C., M. & St. P. R. Co.* 83 Wis. 280; *Smith v. Zimmerman*, 85 Wis. 542; *Davenport v. Stephens*, 95 Wis. 459.

4. Upon this general demurrer, the defendants were authorized to avail themselves of the objection that the plaintiffs had an adequate remedy at law. *Denner v. C., M. & St. P. R. Co.* 57 Wis. 218; *Trustees of Kilbourn Lodge A., F. & A. M. v. Kilbourn*, 74 Wis. 452; *Avery v. Ryan*, 74 Wis. 599; *Gullickson v. Madsen*, 87 Wis. 23. It is otherwise as to a mere demurrer *ore tenus*, for then it is waived. *Pierstoff v. Jorges*, 86 Wis. 128; *Meyer v. Garthwaite*, 92 Wis. 571; *Ryan v. Schwartz*, 94 Wis. 404. What is inadvertently said and held in *Stein v. Benedict*, 83 Wis. 604, 616, must be regarded as overruled. It does not appear, however, that the plaintiffs have an adequate remedy at law. Ejectment would merely secure the title and possession, leaving the outstanding deeds and mortgages as clouds upon the title.

5. Under the allegations of the complaint, the judgment and decree of the county court, to the effect that the four adult children of the deceased, Simon, were his sole heirs at law, must be regarded as a nullity, so far as the plaintiffs in this action are concerned. They were infants at the time without any guardian, and had no notice, and of course did not in any way participate in the proceedings; and hence that judgment and decree, in so far as it inferentially attempts to affect the title of the plaintiffs, must, on this demurrer, be regarded as a nullity. *O'Dell v. Rogers*, 44 Wis. 136; *Melms v. Pfister*, 59 Wis. 186; *Jones v. Graham*, 80 Wis. 11. Upon the facts stated, such judgment and decree of the county court was a mere cloud upon the title of the plaintiffs.

By the Court.— The order of the circuit court is affirmed.

KRUCZINSKI and others, Respondents, vs. NEUENDORF and wife, imp., Appellants.

March 24 — April 12, 1898.

Kruczinski v. Neuendorf, ante, p. 264, followed.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

J. C. Officer, for the appellants.

For the respondents there was a brief by *John C. Keefe* and *John S. Maxwell*, and oral argument by *Mr. Keefe.*

CASSODAY, C. J. This is an appeal from an order overruling the demurrer interposed by the appellants to the complaint, which alleges, in effect, the same facts as in the other case brought by the same plaintiffs against these appellants and others (*ante*, p. 264), except as to the facts here-

inafter stated, to the effect that January 16, 1890, the defendants *John F. Neuendorf* and wife conveyed by warranty deed to the defendants August and Maria Kowalski the west half of the land described; that August 20, 1891, the said August and Maria Kowalski made, executed, and delivered to the defendant Horace S. Weeks, as trustee, their certain mortgage, covering the land last described, to secure the payment of $750 three years after date, with interest at seven per cent., payable semi-annually, which mortgage was recorded August 31, 1891; that February 21, 1895, the said August and Maria Kowalski conveyed by warranty deed to the defendant Frank Drewinak the land last described, subject to the mortgage for $750, which deed recited a consideration of $1,500, and was duly recorded February 25, 1895. The complaint prays judgment, as in the other case, and that the mortgage to Horace S. Weeks, as trustee, be declared null and void, so far as the interests of the plaintiffs in this action are concerned, and that their interests may be released from the pretended lien and incumbrance of the said mortgage, and the cloud be removed; that the plaintiffs may have and recover of and from the defendants Frank Drewinak and *John F. Neuendorf* and August Kowalski $1,500, for their undivided one-half interest in the rents and profits; and for general relief, with costs and disbursements.

For the reasons given in the opinion filed in the other case, the order of the circuit court is affirmed.

By the Court.— Order affirmed.

ROANE IRON COMPANY, Appellant, vs. WISCONSIN TRUST COMPANY, Garnishee, Respondent.

March 24 — April 12, 1898.

Constitutional law: Special legislation: Voluntary assignment: Garnishment: Trust company.

1. The act authorizing the incorporation of trust companies and giving them power to act as assignees, without giving bond or security in the discretion of the court, other than by deposit of securities with the state treasurer (sec. 6, ch. 263, Laws of 1891, as amended by ch. 160, Laws of 1895), is a general law, and is not subject to objection under sec. 31, art. IV, Const., prohibiting special legislation for granting corporate powers or privileges, or discriminating in favor of a class.
2. That act confers no banking powers upon such companies, but expressly excludes the exercise thereof, and it did not need to be submitted to a vote of the people under sec. 5, art. XI, Const.
3. In garnishment proceedings against a trust company, by a creditor of a corporation for which it is assignee, the question cannot be raised whether the capital stock of such trust company has been paid up in cash or securities.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

The facts of the case are stated in the opinion.

For the appellant there was a brief by *Mock, Riley, Wittig & Schinz*, attorneys, and *Moritz Wittig, Jr.*, of counsel, and oral argument by *Moritz Wittig, Jr.* They argued, *inter alia*, that the several acts authorizing the organization and defining the powers of trust companies (ch. 263, Laws of 1891; ch. 160, Laws of 1895) are special acts granting special corporate privileges, in violation of subd. 7, sec. 31, art. IV, Const., and are therefore void. *Kimball v. Rosendale*, 42 Wis. 415; *Clark v. Janesville*, 10 id. 177, 181, 191; *Wis. Keeley Inst. Co. v. Milwaukee Co.* 95 id. 153–158. They are class legislation. *Durkee v. Janesville*, 28 Wis. 464; *Wilder v. C. & W. M. R. Co.* 70 Mich. 382; *Grand Rapids*

Chair Co. v. Runnels, 77 id. 104, 111; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 164; *Braceville Coal Co. v. People*, 147 Ill. 70; *Millett v. People*, 117 id. 301; Cooley, Const. Lim. 391; *Foxworthy v. Hastings*, 23 Neb. 772, 778–9. It cannot be due process of law to give to certain corporations the special and exclusive privilege and franchise of holding an important office, and drawing large fees, without giving any security. A corporation appointed assignee cannot be removed by the court. *Burtt v. Barnes*, 87 Wis. 519, 522. The acts violate secs. 1, 4, 5, art. XI, Const., in conferring banking powers. *Reed v. People ex rel. Hunt*, 125 Ill. 595–600; 3 Am. & Eng. Ency. of Law (2d ed.), 789, 796–802; *Henderson L. & R. E. Asso. v. People ex rel. Cobb*, 163 Ill. 196; *Sykes v. People*, 132 id. 32, 41; *Kennedy v. Knight*, 21 Wis. 340, 346; *Baker v. State*, 54 id. 368, 376–7; *In re Koetting*, 90 id. 171, and cases cited; *Richmond v. Blake*, 132 U. S. 592; *Way v. Butterworth*, 106 Mass. 76. The defendant trust company was not legally organized and authorized to act as assignee. *Zanesville v. Gas Light Co.* 47 Ohio St. 1.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence*.

WINSLOW, J. On the 8th day of June, 1896, the Moore Manufacturing & Foundry Company, a corporation, made a voluntary assignment for the benefit of its creditors to the *Wisconsin Trust Company*, which accepted the trust, and received into its possession the property of the assignor. The trust company is a corporation organized and existing under ch. 158, Laws of 1887, ch. 263, Laws of 1891, and ch. 160, Laws of 1895. The trust company took no oath, and gave no bond as assignee, but had complied with all the requirements of law as to the depositing of securities with the state treasurer. The plaintiff company, being a creditor of the assignor, thereupon garnished the trust company, and claims

that the assignment is void. The garnishee is a trust company organized pursuant to law for the purpose of acting as trustee in the execution of trusts of various kinds, and among the powers conferred on it by law it is authorized to execute the offices of executor, administrator, trustee, receiver, or *assignee*, and in such cases it is not required to take any oath, or give any bond or security, except in the discretion of the court, other than the deposit of a certain amount of securities with the state treasurer. Sec. 6, ch. 263, Laws of 1891, as amended by ch. 160, Laws of 1895.

The principal contentions made by the appellant are that the law authorizing such companies to act as assignee without bond such as is required of a natural person is unconstitutional, as special legislation, conferring corporate powers, and as discriminating in favor of a class. Const. Wis. art. IV, sec. 31. It is also claimed that the act attempts to confer banking powers, and hence is void, because it has not been submitted to vote of the people. Const. XI, sec. 5. That a corporation may be authorized by law to act as trustee is very well settled. 1 Beach, Trusts, § 12; 2 Beach, Trusts, §§ 674, 675; Chaplin, Express Trusts, § 112. That the law authorizing the organization of such corporations is a general, and not a special or private, law, is certain. There is no more reason for calling it a special or private law than there is for calling all of the general laws which authorize the formation of corporations for specified purposes and with specified powers, special or private laws. The fact that it gives no bond except in the discretion of the court, but gives security by depositing securities with the state treasurer, cannot be considered as unjust discrimination. Such reasoning would invalidate many just and salutary laws. The question is one of legislative policy. *Minnesota L. & T. Co. v. Beebe*, 40 Minn. 7.

We have not been able to see that the act confers banking powers on such companies. The act itself provides that

"nothing herein contained shall be construed as giving the right to issue bills to circulate as money, or buy or sell bank exchange, or do a banking business."

An attempt was made to show that certain of the subscriptions to the capital stock of the trust company had not been paid in cash, but in securities. This question could not be raised by collateral attack.

The judgment dismissing the garnishment proceedings was plainly right.

By the Court.— Judgment affirmed.

---

99 276
100 256
100 261
101 603

99 276
f105 54

99 276
f105 360

99 276
f106 560
e106 574

99 276
p109 411
109 415

GORES, Appellant, vs. DAY, imp., Respondent.

March 24—April 12, 1898.

Corporations: Directors' liability for loss through fraud or negligence.

Directors of corporations, independent of any statute on the subject, are liable for corporate property misapplied or lost through their culpable negligence or fraud, and under secs. 3237, 3239, R. S. 1878, any creditor of such corporation can maintain an action in equity against such directors to enforce such liability.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The substance of the complaint is that the Plankinton Bank, a corporation that had existed for upward of six years prior to the 1st day of June, 1893, in the city of Milwaukee, Wisconsin, and there conducted a large banking business, on that day made an assignment to William Plankinton, for the benefit of its creditors; that there were about 800 of such creditors, representing claims aggregating over $1,400,000, $220 of which was due the plaintiff; that the defendants, for several years prior to such assignment, owned

a majority of the stock of the corporation, controlled its affairs, and constituted its board of directors; that they gave out and represented, in various ways set forth in detail in the complaint, that the bank possessed $200,000 of unimpaired capital, and $150,000 of surplus, and was a safe banking institution, and that, relying thereon, plaintiff and other creditors vested money therein and became creditors thereof; that such directors were grossly negligent in the performance of their duties; that they knowingly allowed large sums of money to be loaned to irresponsible persons without adequate security therefor, including some $367,000 to *Frederick T. Day*, one of their own number, and the president of the bank; that such directors, knowing that *Day* was incompetent for the trust, elected him to the position of president of the corporation, and allowed him to practically control its affairs, and to withdraw, from time to time, assets by way of loans to himself, altogether to the large amount stated, and also allowed him to purchase stock of the bank when it was insolvent, pay for the same out of its assets, and take the title thereto in his own name; that the directors, through a long period of time, were culpably negligent in the management of the affairs of the bank, thereby permitting its assets to be dissipated and lost, causing the insolvency which rendered the assignment for the benefit of creditors necessary, and which caused a loss to plaintiff and the other creditors, of fifty per cent. of their claims; that such creditors have no remedy for the wrongs stated, except by this action against the defendants as directors and managers of the corporation, for the abuse of their trust. The complaint further stated that the remaining assets of the corporation are still in the hands of William Plankinton, as assignee, and that application to the corporation or its officers, to institute the action, would be useless.

The prayer for relief is, among other things, that judg-

ment be rendered in favor of the plaintiff and all creditors participating with him:

(1) That defendants are severally liable for the deficiency of assets necessary to pay such creditors, and that they be adjudged to pay the entire amount of such deficiency, with the costs and disbursements of this action.

(2) That an accounting be had to determine the amount due the creditors participating in this action.

(3) That upon such accounting being accomplished, the defendants pay into court, or to a receiver appointed for that purpose, the amount found due the plaintiff and all participating creditors.

Defendant *Frederick T. Day* demurred to the complaint upon several grounds, upon which the demurrer was sustained, because no cause of action was stated against him, and further, because the court had no jurisdiction of the subject of the action. Plaintiff appealed.

For the appellant there was a brief by *G. J. Cox*, attorney, and *M. M. Riley*, of counsel, a separate brief signed by *M. M. Riley* and *Moritz Wittig, Jr.*, of counsel, and *Mock, Riley, Wittig & Schinz* and *G. J. Cox*, attorneys, and oral argument by *Mr. Wittig*.

[No brief on file for the respondent.]

MARSHALL, J. The above statement, without adopting the language of the complaint, sufficiently shows the nature of the action and the facts alleged in support of it. In the briefs of counsel the complaint is treated in so many aspects that it is difficult to determine therefrom what the pleader intended. It is said that the action is in equity for an accounting of corporate assets negligently lost; that it is an action for losses to the creditors by mismanagement; that it is an action for damages; that it is an action to enforce a personal liability to plaintiff and the other creditors; that it is an action to enforce a statutory liability of the directors

under secs. 3223, 3224, 3227, R. S. 1878; and that it is an action for misfeasance of officers in the management of the affairs of the defendant bank, and to compel them to return what they fraudulently and criminally misappropriated. There is much inconsistency in the numerous claims, but looking at the pleading itself, it is quite clearly an effort to invoke the jurisdiction of the court under secs. 3237, 3239, R. S. 1878, which provide that the circuit court shall have jurisdiction over directors, managers, trustees, and other officers of corporations, to compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge, to order and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money, and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such directors, managers, trustees, or other officers; and to set aside all alienations of property made by the directors, trustees, or other officers of any corporation, contrary to the provisions of law or for purposes foreign to the lawful business and objects of such corporation, in cases where the person receiving such alienation knew the purposes for which it was made; and that such jurisdiction may be exercised in an action prosecuted by any creditor.

The complaint sets forth the creditor capacity of the plaintiff, the official character of defendants as directors of the corporation, and facts showing that the assets of the corporation were largely wasted and lost through the culpable negligence and fraud of such directors, and asks that they be compelled to account for their misconduct by restoring such lost assets, or the equivalent thereof in money, sufficient to satisfy the claims of the participating creditors. The liability of the directors of the corporation to account, under such circumstances, is not statutory, so the complaint

does not come under sec. 3223, R. S. 1878, authorizing a creditor to bring an action to enforce such liability. Directors are liable to be charged as trustees of property fraudulently misapplied or wasted by them, independent of any statute on the subject, but the duty of enforcing such liability is in the managing officers of the corporation, though it may be performed by stockholders, or creditors, or possibly the assignee, or successor of the corporation, when the circumstances are such as to make that necessary, independent of any statute on the subject. Sec. 3237, R. S. 1878, does not materially add to the jurisdiction of the court; that existed under its general equity powers. But sec. 3239 goes further and provides that the jurisdiction shall be exercised in an action prosecuted by any creditor.

It follows from what has preceded that the complaint does not state a cause of action to enforce a statutory liability, nor an action for damages for the fraud alleged, but does state facts sufficient to constitute a cause of action to compel the defendants to account for assets of the bank lost through their wrongdoing,—not account to the plaintiff, or plaintiff and his associates, for their benefit solely, but, under the circumstances stated in the complaint, to the representative of the corporation, that is, its assignee for the benefit of creditors. Plaintiff and those participating with him in this action have no right to have the assets recovered, administered for their benefit, as appears to be the scheme of the pleader, but the restoration must be to the assignee, either directly or by payment into court, to be administered by him, in lieu of to the corporation, for the benefit of all the creditors.

The fact, however, that the relief prayed for is not the proper relief on the facts alleged, does not militate against the sufficiency of the complaint, since the facts pleaded constitute an equitable cause of action, and the prayer invokes the same jurisdiction. The right to maintain the action on

the facts is fully covered by the decision of this court in *South Bend Chilled Plow Co. v. George C. Cribb Co.* 97 Wis. 230.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings according to law.

---

99 281
101 233

99	281
111	1121
111	1612
99	281
117	1 81

YAHR, Appellant, vs. JOINT SCHOOL DISTRICT NO. 2 OF THE TOWNS OF PRINCETON AND ST. MARIE, Respondent.

March 24—April 12, 1898.

Appeal: Nonsuit: Building contract: Liability of owner for materials: Condition precedent: Waiver.

1. Upon the trial of a question of fact by the court without a jury, a nonsuit is never proper under our practice; and yet if, on appeal in such a case, it appears that the plaintiff entirely failed to show any legal demand against the defendant, the judgment of nonsuit will be affirmed.
2. Where a school district, in a contract for the erection of a school house, agreed with the contractor to pay all bills for materials upon the indorsement of such contractor in the form of an order, and such payments were to be accepted as payments on the contract, *held*, that there was no privity of contract between the school district and the furnisher of materials; that the district had assumed no obligation to pay bills for materials except on the order of the contractor, and then only to the extent of the contract price; and that it did not, by making advancements to such materialman on the verbal order of the contractor before any bill was presented, waive the requirements of the contract, or give such materialman any right of action against it.

APPEAL from a judgment of the circuit court for Green Lake county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

On April 30, 1894, defendant and one Gustave Krause entered into a contract by which the latter agreed to build a school house for the defendant for the sum of $9,215. The

contract contained, among other things, certain provisions to the effect that the school district should pay all bills for materials, upon the order of Krause, and, when so paid, such payment should be deemed a payment of so much of the consideration of the contract. The contractor entered into the performance of his engagement, and from time to time purchased building materials from the plaintiff, amounting in all to the sum of $2,822.82, and which were used in the construction of the school house. During the progress of the work, defendant paid plaintiff, upon the verbal order of Krause, $1,800, and his account was reduced in various ways until the balance due was $854.10. The plaintiff brought this action directly against the school district, claiming that it was liable to him under the contract. The action was tried by the court without a jury; and, after hearing the proofs, the court made an order dismissing the action, and rendered a judgment against the plaintiff for costs. No findings were made or filed by the trial court. The plaintiff appealed from the judgment against him for costs.

Perry Niskern, for the appellant.

For the respondent there was a brief by *Frank E. Clark*, attorney, and *Thompson, Harshaw & Thompson*, of counsel, and oral argument by *Mr. Clark*.

BARDEEN, J. The proceedings of the trial court were irregular. Sec. 2863, R. S. 1878, provides that, upon a trial of a question of fact by the court, the judge shall give a decision in writing, stating separately (1) the facts found by him, and (2) his conclusions of law thereon. The record shows that, after plaintiff rested his case, the defendant moved for a nonsuit, which motion was granted, and thereupon an order was entered dismissing the action. This was clearly against settled practice and the requirements of the statute, and, except for the fact that the evidence shows

that plaintiff has no cause of action, would necessitate a reversal of the judgment. It seems entirely unnecessary to state that, in trials by the court without a jury, a nonsuit is never proper under our practice.

Notwithstanding a jury had been waived and the trial had proceeded before the court, plaintiff's counsel has argued at some length that the nonsuit should not have been granted, because "there was evidence to go to the *jury* at least on the question as to whether plaintiff should not recover part of his claim." The only substantial question raised by the plaintiff's contention is whether there was such a waiver of the terms of the building contract, under the circumstances in proof, as to render the defendant liable in this action. The contract contained the following provisions: "All bills for materials used in and about said building shall be paid by the said first party [school district] upon the indorsement of second party [Krause], which indorsement shall be an order for first party to pay the same. The said bills shall be retained by first party, upon the payment of which it shall take and hold receipts for the same. . . . All receipts taken by first party as above, either for the payment of materials or for labor, shall be accepted by said second party as and for so much of the consideration as the same shall amount to, and shall be deemed to be the actual payment of so much of the consideration." During the progress of the work, upon the verbal direction of Krause, defendant paid plaintiff at one time $1,000, and at another $800, without any bills having been presented. About October 3d or 4th, plaintiff made out a bill for the balance due him at that time of about $656, and requested defendant's clerk to pay the same, but payment was refused. The bill was not indorsed by Krause. Plaintiff continued to furnish more materials, and on November 21st made out a statement of his account (not a detailed bill), which he presented to the clerk,

showing a balance his due of $854.10. The bill was not indorsed or approved by Krause. On the same day, the defendant and Krause settled on the amount due under the contract, and the latter was paid $23.78. Later Krause made claim for extra work, and on December 10th the defendant admitted that he was entitled to $197.50 therefor, and, upon his order, paid that amount to other parties who had furnished materials for the building. On December 11th, the following indorsement was written on the back of the plaintiff's bill, filed November 21st: "Indorsed. Gustave Krause." At that date Krause had been paid in full.

Upon this state of facts the plaintiff claims the right to recover, at least, the amount due him in October, when he presented his bill and made a demand from the clerk. There was no privity of contract between plaintiff and defendant. The provision in the building contract that defendant should pay bills for materials furnished was for the benefit of Krause, and defendant's right to pay the same as a payment on the contract was dependent upon Krause's indorsement on the bills in the form of an order to pay the same. The fact that defendant made advancements to plaintiff, before any bill was presented, upon the verbal direction of Krause, is in no sense a waiver of the requirements of the contract. It was a mere gratuitous accommodation, outside of the contract. The school district assumed no obligation to pay bills for materials, except on the order of the contractor, and then only to the extent of the contract price. This provision in the contract did not inure to the benefit of plaintiff except upon his compliance with its terms. The fact that he sold building materials to Krause, which went into the school building, gave him no right of action against the defendant, such as he here is seeking to enforce. He does not claim to have sold any materials or done any act to his prejudice in reliance upon the supposed waiver. No principle of estoppel

can be invoked against the defendant. The plaintiff having entirely failed to show any legal demand against the defendant, he cannot complain that he was sent out of court.

By the Court.—The judgment of the circuit court is affirmed.

RASCH, Respondent, vs. NOTH, Appellant.

99 285
103 464 467

March 24—April 12, 1898.

Ejectment: Projection of roof.

Where R. and N., who were owners of adjoining lots, each occupied up to the division line between them, and N. built a barn with a foundation resting wholly upon his own land, but the eaves projected and overhung that line some ten or eleven inches and the drip therefrom fell upon the roof of R.'s barn, built close to the same line, and were carried thereby so as to fall on N.'s land, and no complaint was made until suit brought, and no damage was proved, *held* that, upon these facts, R. could not maintain ejectment for such projection of N.'s roof over his land.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The facts in the case are stated in the opinion.

For the appellant the cause was submitted on the brief of *James Kirwan*, attorney, and *L. J. Nash*, of counsel.

For the respondent there was a brief by *J. E. McMullen*, attorney, and *C. E. McMullen*, of counsel, and oral argument by *C. E. McMullen*. To the point that ejectment would lie for the projection of one person's eaves over another's land, they cited *Gilliam v. Bird*, 8 Ired. Law, 280; *Huggins v. Ketchum*, 4 Dev. & B. Law, 415; *Childs v. Nelson*, 69 Wis. 125; *Stedman v. Smith*, 92 Eng. C. L. 1, and other cases noted by the court.

CASSODAY, C. J. This is an action of ejectment. The defendant answered by way of a general denial and adverse possession. A trial by jury being waived, the cause was tried by the court, and the findings of the court are to the effect that block 4 of the village, now city, of Chilton, was platted in 1852, and consisted of lots 1, 2, and 3 lying in the extreme northern portion of the block, which was of irregular shape, and another large and irregular lot, called the "Mill Lot," adjoining them upon the south; that the plaintiff owns the west one-half of the mill lot, which is immediately south of lot 3, and the defendant owns lots 1, 2, and 3; that both parties claim through and under a common grantor as far back as 1865; that at that time stakes designating the corners of the lots and the division line between lot 3 and the mill lot were still standing, and were pointed out to the purchaser; that in 1869 the original plat stakes were still standing and visible; that the then proprietors of lot 3 and the mill lot, respectively, participated in the location of the line between the two lots, and built a line fence thereon; that the same was then treated by the respective proprietors as the division fence located upon the true line between lot 3 and the mill lot until 1883, when the then proprietors conveyed lots 1, 2, and 3 to the defendant, who has since occupied up to such line fence as the true line; that in 1875 the respective proprietors dug a well on the line of said fence, each paying one half of the expense of its construction; that in 1891 the west one-half of the mill lot was conveyed to the plaintiff; that since that time the plaintiff and defendant have used the well in common; that the premises in dispute are northerly from such division fence, and are a part of lot 3, and not a part of the mill lot; that since 1869 the defendant and his grantors have held and occupied adversely all of the land lying northerly from the division fence; that the defendant has built upon lot 3 a barn, which stands and rests wholly upon his own soil, northerly from

the division fence; that the eaves of such barn did project and overhang the line to the extent of ten or eleven inches, but that the drip from the eaves fell upon the plaintiff's barn, which was also built so close to the line that its eaves, being lower down than the eaves of the defendant's barn, received and receive upon the northerly slant of its roof the water dripping from the eaves of the defendant's barn, and cast the same, together with all that falls upon its northerly slope, back northward on the defendant's land; that no complaint by the plaintiff or his predecessors or grantors was ever made to the defendant on account of the projection and overhanging of the eaves of the defendant's barn, and no evidence was given as to damage, if any, occasioned by such projection.

As conclusions of law the court found, in effect, that such projection of the eaves of the defendant's barn constituted an invasion of the plaintiff's rights which was redressible in an action of ejectment; that the plaintiff was entitled to judgment accordingly, and for costs, and ordered the same to be entered. From the judgment so entered the defendant brings this appeal.

We are clearly of the opinion that this action of ejectment cannot be maintained upon the facts found by the trial court. Certainly, the cases in this court do not authorize a recovery in such a case. *McCourt v. Eckstein*, 22 Wis. 153; *Zander v. Valentine Blatz Brewing Co.* 89 Wis. 164; *S. C.* 95 Wis. 162. This last case, in line with the first, held, in effect, that "an intrusion by one lot owner of his foundation wall upon the land of the adjoining owner, without permission, is a trespass, and may be treated as a disseisin; but, if the owner of the land so intruded upon extends his own building to his line, and rests it upon such wall, and occupies the same continuously, he thereby elects to treat the intrusion as a mere trespass, and cannot maintain ejectment therefor." While it is found in the case at bar that the eaves of the defend-

ant's barn projected ten or eleven inches over the line, yet it was also found that the eaves of the plaintiff's barn projected under the eaves of the defendant's barn sufficiently to carry the water from both roofs northward onto the defendant's land. There is no dispute but that each party owns and occupies to the line mentioned. The only dispute is as to whether the plaintiff can maintain ejectment for such projection of the eaves of the defendant's barn, upon the facts found; in other words, whether the plaintiff can thus occupy his premises clear to his line, and at the same time maintain ejectment for such mere intrusion. And we must hold that he cannot. There are cases holding that one is liable in ejectment for the projection of his roof over another's land. *Murphy v. Bolger Bros.* 60 Vt. 723; *Sherry v. Frecking*, 4 Duer, 452. In others it is held that such action cannot be maintained. *Aiken v. Benedict*, 39 Barb. 400; *Vrooman v. Jackson*, 6 Hun, 326. See, also, *Leprell v. Kleinschmidt*, 112 N. Y. 364, where the question was left undetermined; *Harrington v. Port Huron*, 86 Mich. 46; *S. C.* 13 L. R. A. 664. It is unnecessary to determine the question in the case at bar.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the complaint.

On the question what disseisin will support ejectment, including cases of projection of eaves, see note to *Harrington v. Port Huron* (86 Mich. 46), in 13 L. R. A. 664.—REP.

KNOPKE, Appellant, vs. GERMANTOWN FARMERS' MUTUAL INSURANCE COMPANY OF GERMANTOWN, WASHINGTON COUNTY, WISCONSIN, Respondent.

March 24—April 12, 1898.

Evidence: Instructions as to weight of evidence: Improper remarks by counsel: New trial.

1. The plaintiff, when being cross-examined by defendant's counsel, was proceeding to make some statement not called for, and such counsel interrupted him, insisting upon a direct answer to his question, and said to the witness in the presence of the jury, "You are not the innocent Abigail you pretend to be," adding, "I can tell about the old man for a good many years, . . . that party is not an innocent party in court." *Held* that, though such remarks were highly improper and out of order, yet they were not a sufficient cause for reversing a judgment for the defendant.
2. Upon the trial of the issue whether the plaintiff intentionally set fire to the buildings insured by the policy sued on, *held*, that a question asked of the plaintiff, for the avowed purpose of showing absence of motive to set such fire, as to whether he lost any money in the building, was properly excluded, in the absence of an offer or attempt to show that any such considerable sum as might affect his motives was lost there.
3. An appellant who voluntarily brought improper evidence into a case cannot urge the admission thereof as ground of error.
4. Where the defense set up in an action upon an insurance policy was that the plaintiff intentionally set fire to the insured premises, the court instructed the jury to the effect that the presumption of innocence existed until the jury were satisfied by the preponderance of evidence of the plaintiff's guilt, and repeated several times that the case was to be decided upon the preponderance of evidence, which he defined as that which weighs most. *Held*, that it was not error to refuse to add to such instruction that "there is no preponderance unless the testimony adduced is sufficient to overcome the presumption of innocence."
5. A new trial will not be granted on the ground of newly-discovered evidence if that is merely cumulative or impeaching.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action upon a standard policy of insurance issued by the defendant to the plaintiff, and covering the plaintiff's house and other buildings, and also his personal property; the buildings being insured for $1,850, and the personal property for $1,000. The entire property was destroyed by fire July 7, 1896, during the term of the policy. There is no question raised as to the sufficiency of the complaint. The defenses relied upon were that the plaintiff was guilty of fraud and false swearing in making out his proofs of loss, and that he intentionally set fire to the buildings. After the evidence was in, a special verdict, consisting of the following questions, was submitted to the jury: "First. Was the plaintiff guilty of fraud in making out his proofs of loss as to the personal property insured? Second. Was the plaintiff guilty of intentional false swearing in making out his proofs of loss as to the personal property insured? Third. What was the value of the personal property insured and destroyed by fire? Fourth. Did the plaintiff intentionally set the fire by which the dwelling house and other insured property was burned?"

After being out a considerable time, the jury returned into court, and handed to the court the following communication: "If the plaintiff set the fire, or knowingly caused it to be set, could we answer the fourth question 'Yes' or 'No'?" Thereupon the court instructed the jury as follows, to which due exception was taken:

"The rule of law is that what a man does by another, or by an authorized agent, he does by himself; that is, if I authorize and direct a man to do a certain thing for me, it is precisely the same in law as if I did it myself. So, if you find the plaintiff directed and authorized some one to set this fire, it is the same thing as if he did it himself. If there is no further information, you may retire.

"*Question.* What do you wish to be instructed further? *Answer.* About the weight of evidence. *Question.* Preponderance of evidence? *Answer.* Preponderance of evidence.

"Preponderance of evidence, I told you, meant this: I told you that, to determine the question in this case by the preponderance of the evidence, the preponderance of the evidence meant you are to put all the evidence of the plaintiff on one side of the scale, and you are to put all the evidence in favor of the defendant on the other side of the scale, and which ever side makes down weight had the preponderance of the evidence. Now, evidence is what convinces a man of the truth. If a witness swears to something you do not believe to be true, that is testimony, and not evidence. If a witness says something you are satisfied, in your sound judgment, is not the truth, then you are entitled to disregard it; and I told you it is for you to determine how much weight shall be given to testimony of any witness. It is for you to determine, in case of a conflict of evidence, what witness tells the truth, and where the truth lies. You are not to determine it arbitrarily or through prejudice, but weigh it over carefully and consider it carefully, and take into consideration all the circumstances,—all the evidence in the case; and then it is for you to determine what the truth is, and how much weight, or how little, you should give to any witness.

"*By a juryman:* If the jury agree that not any of the evidence be truthful, how are we to decide? If we should decide not any of the evidence furnished proof, how are we to decide? *By the court:* That is rather a queer question. That seems to me, you would not believe anybody that has testified on either side. The presumption is there is some truth in this case, and some evidence, or something like that; and it would be a very remarkable case where the jury would be justified in believing nobody that testified in the case, whatever. I don't think I have anything further to say upon that question. But there may be one other point, perhaps, that some of the jurors had in their mind. I told you in criminal cases the rule was, in order to

find a man guilty, you must find beyond a reasonable doubt; but this is different from a criminal action. This is a civil action, and you are to determine whether or not this company shall pay this money; and in this case *you are only to be satisfied from the preponderance of the evidence.* If it come to a criminal action, it would be different. Then you must find beyond a reasonable doubt. But in this case you are only to be satisfied as to the preponderance of the evidence, because it is only a civil action to pay money. I told you also that a man is presumed to be innocent until the contrary is established. In this case the plaintiff would be presumed to be innocent of setting the fire until it was established by the preponderance of the evidence that he did set it. As I have said, it is only necessary to *satisfy you by a preponderance of the evidence, and not beyond a reasonable doubt.*"

The jury thereupon returned into court with the special verdict, and answered the first two questions, "No;" the third question fixed the value at $750; and the fourth question, "Yes." Upon the return of this verdict the plaintiff moved for a new trial upon the minutes of the court, for alleged errors in the admission and exclusion of evidence, and in the charge of the court, and in the submission of the special verdict. The plaintiff also moved for a new trial upon certain affidavits, which were claimed to disclose newly-discovered evidence. These motions were denied, and exceptions taken; and a judgment was rendered dismissing the complaint, and for costs, from which the plaintiff appeals.

For the appellant there were briefs by *Hume, Oellerich & Jackson,* and oral argument by *John W. Hume.* They contended that the judgment should be reversed for the imputation by counsel of facts not pertinent to the issue, but calculated to prejudice the case. *Brown v. Swineford,* 44 Wis. 292; *Clink v. Gunn,* 90 Mich. 135; *Amperse v. Flecken-*

stein, 67 id. 247; *People v. Montague*, 71 id. 447; *Rickabus v. Gott*, 51 id. 227; *Sasse v. State*, 68 Wis. 530; *Turner v. Muskegon M. & F. Co.* 97 Mich. 166. The evidence in relation to money lost in the fire was competent. *Farmers' Mut. F. Ins. Co. v. Crampton*, 43 Mich. 421.

For the respondent there was a brief by *Felker, Stewart & Felker*, and oral argument by *F. C. Stewart.*

WINSLOW, J. 1. The first error alleged is with regard to certain remarks made by the defendant's attorney upon the cross-examination of the plaintiff. The plaintiff had testified to the circumstances of the fire and the value of the items of property destroyed, and upon his cross-examination the following colloquy took place: Question. "What were those two men doing while that fire was burning?" [Referring to two men who helped carry out the housekeeper's quilts and blankets.] Answer. "They helped carry out the housekeeper's beds, and two boxes, one quilt, two blankets,— and that's all; and then nobody could get in. It didn't take two minutes after we woke up that the kitchen — if I had time enough I save —" By Mr. Bouck: "Answer the question. You are not the innocent Abigail you pretend to be. I can tell about the old man for a good many years." By Mr. Hume: "I object to that statement before this jury." By Mr. Bouck: "Now I insist. I said that that party is not an innocent party in court, and I insist he answer the question." To these remarks, counsel for plaintiff then and there duly excepted. By the court: "Just answer the questions, and stop." To which remarks of the court, plaintiff then and there duly excepted. We shall not attempt to justify the remarks made. They were clearly out of order, and cannot be defended. Some allowance, however, must be made for the natural vehemence of counsel in an action which is hotly contested. The witness was plainly proceeding to make statements not called for by any question, and the very

natural impulse of counsel was to stop him and call him to order. While we cannot approve the language used, still, considering the occasion and the evident attempt of the witness to inject into the answer matters not asked about, we are not able to say that it should be regarded as reversible error. It is entirely different from the language used in *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157. We cannot reverse a judgment for every improper chance remark made by counsel in the course of a heated trial,—especially when made under the provocation offered by a too willing witness.

2. Upon rebuttal the plaintiff was recalled by his own counsel, and asked if he lost any money which was in the house at the time of the fire; and it was explained by counsel that the testimony was offered simply to show want of motive in the plaintiff for setting the fire. This evidence was ruled out, upon objection by the defendant, and this ruling is alleged as error. There was no offer to show that the sum alleged to have been lost was any considerable sum. It may not have been more than $1. Certainly the loss of such a sum could cast no light upon the question of motive, when the insurance sought to be recovered was $1,000. If such evidence were admissible at all on the subject of motive,—which is not decided,—the court should be advised that the sum alleged to have been lost was large enough to afford reasonable ground for an argument that the plaintiff would not willingly lose it for the sake of recovering the insurance. Such seems to have been the case in *Farmers' Mut. F. Ins. Co. v. Crampton*, 43 Mich. 421, which is relied upon by the appellant.

3. Error is claimed because the court allowed the defendant to prove that a former house standing on the same site burned down several years before the fire in question, and while the plaintiff was occupying it. Examination of the record shows that this evidence was volunteered by the plaintiff. It appeared upon his cross-examination that there

had been another house on the same site as the one destroyed, and the plaintiff was then asked how long it remained there, to which he replied, "Well, that burned down the second year I was there." The statement, having been brought into the case by the plaintiff voluntarily, is not a ground of error.

4. Errors are alleged in the charge, and in the refusal to give certain instructions in full as requested. The plaintiff requested a charge to the effect that the presumption of law is that all persons are innocent of crime until their guilt is established by competent proof, and that the burden of bringing this proof is on the defendant; that you must be *satisfied* by a preponderance of the evidence that the plaintiff did intentionally set the fire; and that there is no preponderance unless the testimony adduced is sufficient to overcome the presumption of innocence. The trial judge gave this instruction as requested; leaving out, however, the last clause. We do not see that the last clause added anything of moment to the general effect of the instruction. When the jury were told that the presumption of innocence existed until they were satisfied by the preponderance of the evidence of the plaintiff's guilt, the whole question was covered.

But it is said that there was affirmative error in the charge upon the subject of the preponderance of the evidence. The court told the jury in his original charge, as well as in the supplemental instructions, that the case was to be decided upon the preponderance of the evidence, and that "preponderance of evidence" meant putting all the plaintiff's testimony on one side, and all the defendant's testimony on the other side, of the scale, and the side of the scale which makes down weight has the preponderance. In immediate connection with this instruction, however, the court told the jury twice in the original charge, and twice at least in the supplemental instructions, that they must be

satisfied by the preponderance of the evidence that the plaintiff set fire to the house. The general effect of the charge on this subject is very much the same as that given in *Curran v. A. H. Stange Co.* 98 Wis. 599, and what is there said is applicable here. If the court had simply charged that they were to find a verdict on the preponderance of the evidence, it would have been misleading, under the cases cited in the *Curran Case;* but when he added to his definition of "preponderance" the definite statement, several times repeated, that they must be *satisfied* from the preponderance of the evidence before they could find the plaintiff guilty of arson, the charge was not erroneous. This is not a case where an erroneous proposition is laid down in one part of the charge, and a correct contradictory proposition in another. It has often been held in such cases that the latter will not correct the former. The charge here, to the effect that "preponderance of evidence" means that evidence which weighs the most, is correct, as far as it goes. It would be misleading if it stopped there. But when, in addition, it is stated that it must be such a preponderance as satisfies the jury, no reasonable objection can be made to it.

Other criticisms are made of the charge, but it is not deemed necessary to state them particularly. While the charge is not exactly a model in all respects, we discover no reversible error in it.

5. The alleged newly-discovered evidence was either cumulative or impeaching. A new trial will not be granted upon such evidence.

By the Court.— Judgment affirmed.

99 297
117 423

PARLIN & ORENDORFF COMPANY, Respondent, vs. ANGELL and another, Appellants.

March 25 — April 12, 1898.

Appeal: Verdict supported by evidence.

The ruling of the trial court in refusing to set aside a verdict as not being warranted by the evidence cannot be disturbed on appeal if there is any credible evidence to support it.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover on four causes of action, one only being contested, which was on an account stated, for $887. The sole issue tried was whether the account was stated and settled between the parties as alleged. The verdict was for the plaintiff. There was a motion to set the verdict aside and for a new trial, which was denied, and the ruling duly excepted to. The judgment was rendered in plaintiff's favor and defendants appealed.

For the appellants there was a brief by *Freeman & Freeman*, and oral argument by *James Freeman.*

For the respondent there was a brief by *Thompson, Harshaw & Thompson*, and oral argument by *J. C. Thompson.*

MARSHALL, J. The sole question presented is whether the trial court erred in refusing to set aside the verdict of the jury as not warranted by the evidence. The rule that the determination of the trial court on such a question cannot be disturbed on appeal, if there is any credible evidence to support the finding of the jury, is too familiar to justify a discussion of it at this time. Testing the verdict by the record, in the light of such rule, we are unable to discover any warrant for a reversal of the judgment.

By the Court.— The judgment of the circuit court is affirmed.

WARDER, BUSHNELL & GLESSNER COMPANY, Respondent, vs. ANGELL and another, Appellants.

March 25 — April 12, 1898.

Account stated: Appeal: Verdict sustained: Harmless error.

1. Where, in an action upon an account stated, the question whether there was an account stated was submitted to the jury and was found by them in the affirmative, and the plaintiff's recovery was wholly based thereon, *held*, that the admission of evidence of an open account from which the statement was made up, if error at all, was not prejudicial, nor ground for reversal.
2. The refusal of the trial court to set aside a verdict for want of evidence and grant a new trial will not be disturbed on appeal if there was credible evidence to support such verdict.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover on five causes of action, only one of which was contested, that being for $441.78 on an account stated, for goods sold and delivered to the defendants. The answer admitted the delivery of the goods, but denied the sale of them as alleged, and denied the settlement and statement of the account. The answer further denied that there was anything due on such cause of action. The jury found specially that the parties made a settlement and statement of the account between them before the commencement of the action, as alleged, and that the amount agreed upon was $441.78. Judgment was rendered on the verdict and defendants appealed.

For the appellants there was a brief by *Freeman & Freeman*, and oral argument by *James Freeman*. To the point that an account stated changed the nature of the debt, and evidence of an open account was inadmissible, they cited *Shrewsbury v. Tufts*, 41 W. Va. 212, 224; *Tully v. Felton*, 177 Pa. St. 344; *Stenton v. Jerome*, 54 N. Y. 480; *Bass v.*

Bass, 8 Pick. 187; 2 Greenl. Ev. 128; *Lockwood v. Thorne*, 18 N. Y. 288, 299; *Holmes v. D'Camp*, 1 Johns. 36.

For the respondent there was a brief by *Thompson, Harshaw & Thompson*, and oral argument by *J. C. Thompson*.

MARSHALL, J. The first contention is that the trial court erred in admitting evidence to prove an open account, the cause of action being on an account stated. No particular evidence is pointed out in the brief of counsel as having been so improperly admitted, and we have not been able to discover any by an examination of the record. But if such evidence was admitted, defendants were in no wise prejudiced, because the court submitted the case to the jury to find whether there was an account stated between the parties as alleged, and the recovery was on that ground solely. Therefore, if evidence to prove the existence of the indebtedness which was adjusted between the parties was unnecessarily introduced, if error at all, it was not prejudicial error; therefore no ground for a reversal of the judgment. R. S. 1878, sec. 2829; *Jackson v. State*, 91 Wis. 253; *Olson v. Solveson*, 71 Wis. 663.

It is further assigned as error that the evidence was not sufficient to warrant the finding of the jury that there was an account stated between the parties. It does not appear to be advisable to discuss here so simple a matter as what the requisites of such an account are. That was fully and clearly explained to the jury by the trial court, and though some exceptions were taken to the instructions, no such exceptions were argued in the brief, and an examination of the charge satisfies us that it is free from error. There was considerable evidence on the question, certainly enough to form a legitimate basis for the finding made by the jury, so we are unable to say there was no credible evidence in support of it. Hence the ruling of the trial court, refusing to

set the verdict aside on that ground and grant a new trial, cannot be disturbed.

The foregoing covers all the questions of sufficient importance to warrant any mention of them in this opinion.

By the Court.—Judgment affirmed.

---

99 300
102 140
102 381

99 300
s111 [1]486
111 [1]487

99 300
115 [1]335
60 LRA 590

SCHMIDT, Administratrix (STAEFFLER, Administrator, Appellant), vs. MENASHA WOODENWARE COMPANY, Respondent.

March 25—April 12, 1898.

Action for causing death: Survival of right of action.

1. The right of action given by secs. 4255, 4256, R. S. 1878, to certain beneficiaries therein named is personal, and the damages are limited to a mere indemnity for the pecuniary injury resulting therefrom to such beneficiary, and the action therefor does not survive the death of such beneficiary, but abates upon his death and cannot be revived in favor of his administrator.
2. The right of a widow under that statute is not a vested property right and does not survive to her heirs under sec. 4253, R. S. 1878.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

In July, 1894, one Christ Schmidt was killed by an explosion in defendant's factory, under circumstances alleged to be such as to render it liable therefor. Afterwards his widow was appointed administratrix of his estate, and commenced this action to recover damages, under the statute, for her husband's death. Pending the action, she married one *C. W. Staeffler*, by whom she had one child now living. On December 28, 1896, the widow died. *Staeffler* was appointed the administrator of her estate, and of her former husband's estate, and upon proper petition seeks to have this action revived in his name as administrator of the two estates, and asks leave to file a new complaint. The court

denied his petition, and struck his supplemental complaint from the files. *Staeffler*, feeling aggrieved, appeals from the order thus entered.

For the appellant there was a brief by *J. C. Kerwin*, and oral argument by *T. L. Gill*. They argued, among other things, that the action given by the statute becomes as to the beneficiary a vested property right and descends to her heirs. It survives under sec. 4253, R. S. 1878, as being for "other damage to the person;" also under sec. 3252, R. S. 1878, as being one done to property rights or interests. *Quin v. Moore*, 15 N. Y. 432; *Potter v. C. & N. W. R. Co.* 21 Wis. 372; *Castello v. Landwehr*, 28 id. 532; *Lawson v. C., St. P., M. & O. R. Co.* 64 id. 447; *Tuteur v. C. & N. W. R. Co.* 77 id. 503; *Lehmann v. Farwell*, 95 id. 185; *Norton v. Sewall*, 106 Mass. 143; *Cutter v. Hamlen*, 147 id. 471; *Mason v. U. P. R. Co.* 44 Am. & Eng. R. Cas. 449.

For the respondent there was a brief by *Felker, Stewart & Felker*, and oral argument by *F. C. Stewart*.

BARDEEN, J. Under the common law, the right to prosecute the defendant for its alleged negligence in causing the death of Schmidt did not survive. But the wisdom of the legislature has provided that the offending party shall not escape responsibility. Secs. 4255, 4256, R. S. 1878, give a new action, in this case, to the widow, and a right to recover such damages as the jury may deem fair and just in reference to the pecuniary loss to her resulting from such death. The damages that could be recovered are limited to a mere indemnity for the resulting injury to the widow. *Regan v. C., M. & St. P. R. Co.* 51 Wis. 599; *Topping v. St. Lawrence*, 86 Wis. 526. Such damages do not go to the estate of the deceased, but to the beneficiary named in the statute. *Gores v. Graff*, 77 Wis. 174. The theory of the statute as interpreted by the decisions is that certain beneficiaries named therein, who have sustained an injury by reason of the wrong-

ful death, are entitled to be recompensed for the actual loss sustained. The fact that certain beneficiaries named therein take to the exclusion of others would seem to indicate that the legislature never intended that the provisions should inure to the benefit of persons *not* named therein. It is in harmony with this construction that this court held in the *Topping Case* that a complaint was demurrable that did not show that there were beneficiaries in existence who had sustained some pecuniary injury resulting from such death. This construction is emphasized by the last clause of sec. 4256, which limits the recovery to such sum, not exceeding $5,000, as the jury may deem fair and just "in reference to the pecuniary injury resulting from such death to the relations of the deceased specified in this section." The right to recovery, therefore, is personal, and dependent upon pecuniary loss.

Moreover, the action must be brought by and in the name of the personal representatives of such deceased person. There is no authority for its maintenance by any other person. Here the petitioner seeks to revive this action in his name as administrator of the widow, as well as in his name as administrator of the estate of Christ Schmidt. The incongruity of such a proceeding is seen at a glance. The situation now presented is that, if this action may be further prosecuted, the only person in existence entitled to the recovery is the infant child of the widow by her second husband. To avoid the evident incongruity of this situation, counsel argue that the widow's claim became a vested property right, and survives to her heirs under sec. 4253. This section provides that, "in addition to the actions which survive at common law, the following shall also survive, that is to say: actions for the recovery of personal property or the unlawful withholding and conversion thereof, actions for assault and battery or false imprisonment, or *other damage to the person*," etc.

It will be observed that this action is not prosecuted to recover for damages to the person of the deceased. As already stated, it can only be maintained for the recovery of such pecuniary loss as the widow sustained, and cannot, by the broadest latitude of construction, be held to fall under the clause "or other damage to the person," mentioned in the statute. But it is unnecessary to prolong this discussion. This court held in a very similar case that upon the death of the real party in interest the action abated, and could not, in absence of a statute saving the right, be further prosecuted. *Woodward v. C. & N. W. R. Co.* 23 Wis. 400. That case is decisive of this appeal.

By the Court.— The order of the circuit court is affirmed.

KELLETT, Respondent, vs. ROBIE, Appellant.

March 26 — April 12, 1898.

Promise to marry, release of: Excessive damages.

1. Some difficulty having arisen to prevent the marriage of the parties who were engaged, the plaintiff told the defendant that he need not marry her if he did not wish to, and later wrote to him, "If you desire a change, take it, and end the matter right here." The defendant thereupon ceased to visit the plaintiff, and, without objection on her part, courted and married another. *Held*, that plaintiff had released the defendant from his engagement.
2. A verdict for $3,500 damages for a breach of a promise of marriage, against a defendant who was worth only $6,000, *held* to be so excessive as to show passion or prejudice on the part of the jury.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The case is stated in the opinion.

For the appellant there was a brief by *Wesley Mott* and

Felker, Stewart & Felker, and oral argument by *F. C. Stewart.*

For the respondent there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck.*

WINSLOW, J. This is an action for breach of promise of marriage, and the plaintiff has obtained a judgment for damages fixed at $3,500. The contract of marriage was admitted, but the defendant claimed that there was a subsequent mutual release. This was denied by the plaintiff, and upon this issue the case was tried.

The evidence showed that the parties became engaged August 30, 1890, the plaintiff then being twenty years of age; and it was agreed that the marriage should not take place for three years. The parties were farmers' children, and lived with their parents in adjoining towns in Winnebago county, about a mile and a half from each other. After the engagement, the defendant frequently called upon the plaintiff until December 17, 1893, at which time the defendant claims that the plaintiff suggested to him that, as long as his (defendant's) people were opposed to the match, they should separate and call the engagement off, and that he assented to this proposition. The defendant never called on the plaintiff after this time, although they had some correspondence, which is in the record. Soon after this alleged conversation, the defendant commenced to call upon another young lady in the neighborhood, and continued to pay attention to her without objection on the part of the plaintiff, until he was married to her in December, 1895. The plaintiff denied positively that she released the defendant from the engagement. In the course of her examination as a party under sec. 4096, R. S. 1878, she admitted that they had a conversation in December, 1893, in which she says, "I told him if he did not want to marry me, of course he could suit himself; but he said *he* was marrying me, not his people, and he came to see me just the same." The evidence showed

that the defendant was worth about $6,000, composed of his interest in the estates of his father and grandfather, both of which were still unsettled.

Several exceptions to rulings upon evidence and to the charge of the court were argued by the appellant, but, as we do not think we should be compelled to reverse the judgment on account of them alone, we shall not discuss them, but proceed to the main question, namely, whether the verdict is contrary to the evidence.

Upon this question, after careful consideration of all the evidence, and especially of the letters written by the plaintiff after the alleged release, we can come to no conclusion except that the verdict is clearly against the preponderance of the evidence. These letters demonstrate to a certainty that something of a serious nature had interrupted the relations of the parties about the time that the defendant alleges the release took place. No explanation as to what this serious event was is offered, except the defendant's explanation of a release. We shall not give the letters in full, but content ourselves with some extracts, which seem to conclusively establish that the former relationship was broken off, and that marriage was no longer contemplated.

In a letter of January 21, 1894, she says: "*Fred:* If you desire a change, why take it, and end the matter right here. As I said previously, I cannot count second. I am glad of one thing: if we do separate forever, you can always think that I performed my duty by you from the very first to the last." On March 1, 1894, she wrote: "*Fred:* You may think it queer on my part in asking you to come and see me, after what has happened. I would never do so if it were not absolutely necessary, *Fred;* that you know. I know it will cause hard feelings, but I cannot help it. You must know, and the sooner the better. So let me see you as soon as possible. If I have done wrong in writing, please forgive me, *Fred;* it is for your and my welfare." On

March 8, 1894, she wrote again: "I just want you to come just once, and risk everything to oblige me. Your trouble is as nothing compared to mine. I knew you were in town Monday. I seen your horse, and some way I felt you were there. I don't feel hard toward you one bit, *Fred.* You will find me just the same. I am not fickle; once is forever with me; so don't feel bad about nothing. You shall never suffer through me again. I hope the day may come when you forget that you ever knew me. . . . Now, *Fred*, if you don't want to come, and if you think you will be happier by staying away, why I will try and bear it."

When the plaintiff said to the defendant in her letter of January 21st, "If you desire a change, take it, and end the matter right here," we can see no escape from the conclusion that it was an offer of freedom from the engagement; and when it further appears that the defendant acted upon this or a similar offer, and, without objection from the plaintiff but with her knowledge, courted and married another woman, it must be considered that the offer was accepted, and that the plaintiff has become bound by the offer and its acceptance. We are unable to understand how, in the face of this evidence, the jury could have found that there was not a mutual release of the engagement.

In connection with this unaccountable verdict, we cannot refrain from saying that the damages awarded are grossly excessive, and that we should feel obliged to reverse upon this ground in any event. The defendant's estate amounted to about $6,000, and there are no circumstances of aggravation in the case. The defendant is now married, and to give considerably more than half of his property as damages upon the facts appearing here, even if there had been no express release, we regard as out of the bounds of reason. The damages are so far excessive as to show passion, if not perversity, on the part of the jury.

By the Court.—Judgment reversed, and action remanded for a new trial.

99 307
101 6

FULTON, Assignee, Appellant, vs. STEVENS, Respondent. SAME, Respondent, vs. SAME, Appellant.

March 26 — April 12, 1898.

Mutual life insurance: Forfeiture: Nonpayment of assessments: When liability of member terminates.

The contract of membership between defendant and the Wisconsin Odd Fellows' Mutual Life Insurance Company contained a promise on the part of the former to pay assessments, made according to the charter and by-laws of the company, which provided, in substance, as follows: Whenever the secretary of the company shall deem it necessary to replenish the policy fund, he shall make an assessment upon the members of the company by the entry of an order in a book to be kept for that purpose. Within twenty days thereafter he shall notify the members in writing of such assessment. Each member shall be bound by the notice from the time of its deposit in the post office, or delivery to, or the leaving of it with, him, and he shall thereby become liable to pay the assessment within sixty days from the date of the notice. In case of a failure to pay any such assessment within such time, the defaulting member shall forfeit all right under his certificate, and the same shall be void as to the company. Defendant failed to pay an assessment duly levied and noticed to him, within the time required as aforesaid. Other assessments were made and duly noticed before the expiration of such time, and still other assessments were made and noticed thereafter. *Held:*

(1) That the making of the assessment and giving notice thereof, to replenish the policy fund,— not the death of the member,— fixed the liability of the defendant under his contract.

(2) That he is liable for all assessments made and of which he was duly notified before his membership ceased, by reason of failure to pay an assessment within sixty days, as required by his contract, but not for the assessments made thereafter.

[Syllabus by MARSHALL, J.]

APPEALS from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Affirmed.*

Action to recover assessments on several benefit certificates on a mutual insurance policy issued by the Wisconsin

Odd Fellows' Mutual Life Insurance Company. The judgment was for the plaintiff on part of the assessments, and for defendant as to the balance. The amount involved being under $100, the questions to be considered appear from the certificate of the trial judge, which is, in substance, as follows:

(1) June 15, 1881, defendant made three written applications for membership in the Wisconsin Odd Fellows' Mutual Life Insurance Company, plaintiff's assignor, each containing (a) a promise that the applicant, if received, would punctually pay all assessments for which he should become liable, and comply with the by-laws, rules, and regulations of the company, and such as should thereafter be adopted by its board of directors; (b) a stipulation that the application should form the basis of the contract with the company, and that any neglect to pay the assessments made by such company within sixty days after notice thereof should vitiate the certificate of membership and forfeit all rights under it, in the absence of a reinstatement of the applicant to membership according to the regulations of the company.

(2) On each such application a certificate of membership was issued to the defendant, specifying, among other things, that it was issued upon the payment of one dollar, and in consideration of the representations made in the application, which was made a part of such certificate; that the certificate was issued and accepted with the express understanding that any violation of any agreement made in the application, by the assured, should render such certificate void and of no binding force upon the company whatever.

(3) The charter of the company contained, among other things, substantially the following: (a) Whenever the amount in the policy fund shall be insufficient, in the opinion of the secretary, to pay outstanding losses, the secretary shall make an assessment upon the members of the company to replenish such fund, and notify them thereof in the manner provided

in the by-laws, and every such member shall pay to the secretary his or her assessment, within sixty days after the date of notice thereof, and if any member shall fail in that regard, his or her membership shall cease, and the certificate thereof, and all the rights under it, be forever forfeited; provided, however, that the member may be reinstated and the rights under the certificate revived, in the manner, and only in the manner, provided in the by-laws and sec. 12 of the charter; (b) the certificate of membership shall be void and of no binding force or effect upon the company, and all the rights under it forfeited, if the assured shall fail to pay any assessment made upon him or her, within sixty days after the date of the secretary's notice of such assessment.

(4) The by-laws of the company contained the following provisions, in substance: (a) In case of a necessity to replenish the policy fund by an assessment, as provided in the charter, the secretary shall enter an order in a book kept for that purpose, to the effect that, the amount in such fund being insufficient in the opinion of the secretary to pay outstanding losses, an assessment to be known as assessment No. ——, of the year ——, is made and levied upon all the members of the company to replenish such fund; (b) within twenty days after the entry of such order the secretary shall notify all members thereof, by depositing at the post office in the place where his office is located, written or printed, or partly written and partly printed, notices of such assessment substantially in the form now used for that purpose, addressed to the respective members, or to the persons respectively designated by them in writing, filed with the secretary as their agent to receive notices for them, or by delivering such notice to, or leaving it with, the person so designated. Each member shall be bound by the notice from the time of its deposit in the post office, or delivery to, or the leaving of it with, him or her, and shall thereby become liable to pay the assessment to the secretary within

sixty days of the date of the notice, and in case of failure so to do by any member, such member shall forfeit all rights and privileges under his or her certificate of membership, and such certificate shall be utterly void and of no effect on the company; (c) on making the next assessment after any member shall have lapsed, the secretary shall mail him a notice, together with a request for reinstatement, and health statement, as follows:

NOTICE OF LAPSE.

"Milwaukee, Wis., ——.

"To ——: According to our books you have no credit for assessment No. ——, which was due ——. According to our charter and by-laws your certificate has lapsed. It is possible that it is an oversight in you or a mistake with us. Should you be the one at fault, please sign the inclosed, if in good health, and on receipt of the same with the amount due, receipt will be forwarded."

"HEALTH STATEMENT.

"To the Wisconsin Odd Fellows' Mutual Life Insurance Co.: Having been insured in your company by certificate No. ——, division ——, which has been forfeited by reason of nonpayment of assessments, and being desirous of having the same restored to risk, I do hereby certify and affirm that my health is good, and that I accept the renewal on the express condition, that if the certificate is restored, the restoration shall be void, unless I am at this time in good health."

(5) June 1, 1896, and June 15th, July 1st, August 1st, and September 1st, thereafter, assessments were duly levied and notices thereof sent to the defendant in accordance with the foregoing. The notice was in the following form: "You are hereby notified that the policy fund being insufficient to pay outstanding losses, an assessment to be known as

No. ——, of the year ——, has been made and levied upon all the members of the company to replenish such fund, and the amount of your assessment, so made and levied in divisions ——, is ——, which, as provided by the charter and by-laws, is now due and must, under penalty of forfeit, be paid to the secretary or local agent within sixty days after date of notice. We have received notice and proof of death of the following named members since our last assessment." The notice further contained an extract from sec. 12 of the charter, to the effect that every certificate shall be void and of no effect upon the company, and all rights under it be forfeited, upon failure of the member to pay assessments made upon him, within sixty days after the date of the secretary's notice thereof. No forfeitures can be waived otherwise than by written statement under the seal of the company, signed by the secretary, stating in plain terms that all forfeitures up to date are hereby waived. No assessment notice shall be mailed to any member in arrears. No agent is authorized to receive assessments after due, without health certificate.

(6) Defendant never paid any of the assessments mentioned.

(7) On the 1st day of September, 1896, the company sent to the defendant the following notice: "According to our books you have no credit for assessment No. 170, 171, 172, 173, which were due August 1st and July 15th. According to our charter and by-laws your certificate has lapsed. It is possible that it is an oversight in you, or a mistake with us. Should you be the one in fault, please sign the inclosed, if in good health, and on receipt of the same, with amount due, receipt will be forwarded." A form for health certificate and request for restoration was inclosed.

(8) All deaths on account of which the several assessments were made, with the exception of three, occurred prior to the 1st day of August, 1896.

(9) The company never reckoned as assets, assessments

made on the certificate of a member within sixty days prior to a forfeiture of his membership, and never attempted to collect any such assessments, unless by sending notice to members similar to that sent defendant September 1, 1896.

(10) During the course of the company's business, prior to the assessments in question, upwards of $12,569.98 was paid by members whose memberships were thereafter forfeited. Notice of this fact was given to members in the twenty-third annual report of the directors, which stated that none of such members retained any claim upon the company.

(11) On the 11th day of February, 1897, the company made an assignment for the benefit of creditors, to *John L. Fulton.*

The questions of law certified on the foregoing statements of fact are as follows:

(1) Was plaintiff entitled to judgment as rendered?

(2) Was the plaintiff, upon the facts, entitled to a judgment for a further sum of $13.20, the amount of assessments 176, 177, 178, and 179?

The assessments for which judgment was rendered were those made for death losses which occurred before defendant defaulted on any assessment, and made before the forfeiture occurred. The assessments for which judgment was refused amounted to $13.20, and were made after the certificate was forfeited.

For the plaintiff there were briefs by *Quarles, Spence & Quarles*, attorneys, and *Phillips & Hicks*, of counsel, and oral argument by *George Lines.* They argued, *inter alia*, that on joining the company the defendant became by contract bound to contribute his share of losses occurring during his membership, by paying the assessments made therefor. His liability to do so is expressly declared in the charter and by-laws. *Ellerbe v. Barney*, 119 Mo. 632; Niblack, Ben. Soc. & Acc. Ins. §§ 249, 308; *Clark v. Lehman*, 65 Ill. App. 238; *New Era Life Asso. v. Rossiter*, 132 Pa. St.

314; *McDonald v. Ross-Lewin*, 29 Hun, 87; *Smith v. Bown*, 75 id. 231; 16 Am. & Eng. Ency. of Law, 74. It is the happening of losses during his membership which fixes a member's liability to assessments. *Seamans v. Millers' Mut. Ins. Co.* 90 Wis. 490; *Davis v. Shearer*, id. 250; *Davis v. Parcher & J. & A. S. Co.* 82 id. 498; *Mutual Benefit L. Ins. Co. v. Jarvis*, 22 Conn. 133; *Vanatta v. N. J. Mut. L. Ins. Co.* 31 N. J. Eq. 15. That liability continues until an assessment has been made to cover the losses. *Ionia, E. & B. F. M. F. Ins. Co. v. Otto*, 97 Mich. 522; *Ionia, E. & B. F. M. F. Ins. Co. v. Ionia Circuit Judge*, 100 id. 606. The failure of a member to pay his assessment within the time limited, though it forfeits his rights, does not relieve him from any of his obligations. May, Ins. § 553; *Stylow v. Wis. O. F. M. L. Ins. Co.* 69 Wis. 224. Neither withdrawal nor forfeiture will relieve him from liability to assessment to pay losses which occurred before such withdrawal or forfeiture. *Korn v. Mut. Ass. Soc.* 6 Cranch, 192; *Seamans v. Millers' Mut. Ins. Co.* 90 Wis. 490.

F. W. Houghton, for the defendant, contended that the contract of a member was only in the alternative, i. e. to pay assessments or to forfeit all rights. Niblack, Ben. Soc. § 248; *Chicago Mut. L. I. Asso. v. Hunt*, 127 Ill. 257, 277; *In re Protection L. Ins. Co.* 9 Biss. 188; *Rood v. Railway P. & F. C. M. B. Asso.* 31 Fed. Rep. 62; *Burdon v. Mass. S. F. Asso.* 147 Mass. 360, 370; *Farmer v. State*, 69 Tex. 561; 2 Bacon, Ben. Soc. § 378; *Newman v. Covenant Mut. Ben. Asso.* 72 Iowa, 242. The society could not receive assessments after a membership had been terminated by forfeiture without violating its charter.

MARSHALL, J. This case turns on the meaning of the insurance contract. It must go without question that if the facts were such as to permit the application of the doctrine of practical construction, or estoppel thereby, the defend-

ant could not be held liable for any of the assessments sought to be recovered in this case. Such would be the result of following the uniform course of the administration of the affairs of the insurance company by its officers, from the time of its organization; but as we view the contract of insurance, its provisions are clear and their meaning unmistakable, therefore such meaning must be taken as embodying the intention of the parties at the inception of such contract, and that intention must prevail. The familiar doctrine, that where the meaning of language is plain courts must hold to that, and not go outside and make contracts for parties in order to meet difficulties which they failed to anticipate and provide against, is of universal application. The office of judicial construction, whether resorted to in order to give effect to practical construction or otherwise, has no legitimate purpose other than to carry out the intention of the parties, which they sought to express by the contract when made. Therefore, after all, unless such intention can be determined from the contract itself, without violating the rules of language or of law, by the aid of the lights proper to be resorted to for that purpose, including that of the construction the parties gave to the contract when that is proper to be considered, it cannot be adopted and judicially carried out as that which the parties had in mind at the outset. So, as said in *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, in effect, unless language is of doubtful, ambiguous, or uncertain meaning, the doctrine of practical construction has no application. Customary disregard of plain language, however long continued, does not furnish a rule to guide judicial construction.

The contract in question, embraced in the certificate, the application therefor, and the by-laws and charter of the company, contains the following plain provisions: (1) An absolute, unconditional promise on the part of the assured to pay all assessments for which he may become liable,

within sixty days after the date of notice thereof; (2) that when it shall become necessary to replenish the policy fund, an assessment for that purpose shall be made on all the members of the company; (3) that each member shall be bound by the notice from the time of its deposit in the post office and delivery to the member, as provided by the by-laws, and he shall thereby become liable to pay the assessment referred to therein within sixty days after the date thereof; (4) that in case of failure to pay, the member shall forfeit all rights under his certificate of membership, and it shall be no longer binding on the company.

Now, if we look only to the plain language of the provisions of the contract specially referred to, no reasonable controversy can exist but that the parties thereto intended that failure to pay an assessment within sixty days after the date of notice thereof, given as required, should operate to terminate the membership of the defaulting party, but leave him legally liable, nevertheless, for the assessment, and for all other assessments as well regularly made and noticed to him prior to such termination. That is all expressed in words too plain to require interpretation or construction.

It must not be overlooked that the assured did not agree to pay assessments from time to time to cover death losses as they occurred, so no reason is perceived why he should be liable merely because of the occurrence of deaths before the lapse of his membership. What he agreed to do was to pay assessments made during the existence of his membership, to replenish the policy fund. The regular making of an assessment for that purpose, and the sending of the notice thereof, fixed his liability. No other element whatever entered into it.

It appears from the record that a double assessment, so called, was duly made on the defendant on the 1st day of June, 1896, due notice of which was given to him, dated on that day. He did not pay such assessment within sixty days

after the date of such notice, which expired on the 31st day of July, 1896, and his membership in the company then thereby terminated. After the making of such assessment, and before the assured ceased to be a member of the company, a second double assessment was made June 15, 1896, and another July 1, 1896, all aggregating $19.80. On the 1st day of August, 1896, the defendant was not a member of the company; nevertheless there was, on that day, another double assessment made against him, and on the 1st day of September following, a like assessment was made, all aggregating $13.20. The lower court gave judgment in plaintiff's favor for the $19.80, and in defendant's favor on the claim for $13.20 additional. That was in exact compliance with the plain letter and meaning of the contract, as before stated.

Many authorities are cited for our consideration, in support of views contrary to those above expressed, some by the plaintiff to the contention that defendant is liable for assessments made after the termination of his membership, and others by the defendant to the contention that the contract of insurance was unilateral in character, and that the termination of it by failure to pay extinguished all claims of the company to recover assessments. Such of the authorities as touch the question under discussion at all, coincide with the conclusion to which we have arrived. A brief reference to a few of the most important cases cited by counsel will clearly demonstrate that.

In *Ellerbe v. Barney*, 119 Mo. 632, there was a controversy as to whether the contract contained a promise to pay assessments. The majority of the court held to the affirmative on that point. If the decision in that regard was right, the promise was not to pay for the benefit of a policy fund, out of which to pay losses generally, but to pay an assessment of $1.60 on the death of each member, happening during the membership of the assured. The scheme of insurance

did not contemplate a policy fund as in this case. The liability under the contract was plainly fixed, not by assessments and notice thereof, but by the death of a member of the company in the class in which the assured was located by the terms of his certificate. The court held that the assured was liable to pay the assessment agreed upon for the death of each member, which occurred before his policy lapsed, according to the plain terms of the contract. The dissenting opinion by Chief Justice BLACK, concurred in by Justices BRACE and BURGESS, cited confidently by the defendant here for reasoning to sustain the contention that the scheme of insurance under consideration contemplated payment of assessments as mere conditions precedent to a continuation of membership, and not compliance with legal liabilities, does not apply, because the premises upon which the learned judge based such reasoning do not fit this case. He proceeded upon the theory that the contract there under consideration did not contain a promise to pay assessments. The opinion as to the law is perfectly consistent with that of the court to the point that where there is an unconditional agreement to pay, there is a legal liability as to all calls made according to the terms of the contract during the life of the membership. After citing *In re Protection L. Ins. Co.* 9 Biss. 188, upon which the defendant here chiefly relies, the chief justice quoted from Bacon on Benefit Societies, as correctly stating the law, as follows: "The payment of the premiums or assessments is only a condition precedent to the liability of the company. The assured does not promise to pay the premiums, and the company only promises to pay if it has received the agreed consideration, therefore the assured may pay or not as he pleases. He has the perfect right to do either, and need give no excuse for his choice. If he does not pay the contract is ended. *It follows, therefore, that the premium or assessment is only a debt when there is an absolute promise to pay embodied in the contract.*" As

there was such absolute promise to pay embodied in the contract under consideration, manifestly, that doctrine renders defendant legally liable, as determined by the trial court, for the assessments made before the expiration of his membership, and not liable for those made thereafter.

In *New Era L. Asso. v. Rossiter*, 132 Pa. St. 314, the assignee of the insurance company brought suit for unpaid assessments. The contract contained a promise to pay assessments for deaths happening during the life of his membership, payment of such assessment to be made within thirty days after mailing the notice thereof, showing a statement of the death for which it was made. The policy lapsed for failure to pay an assessment. The court held that, by unmistakable language in the contract, the assured was liable for all death losses which occurred before his membership terminated.

In *McDonald v. Ross-Lewin*, 29 Hun, 87, the contract contained a promise to pay assessments, according to a schedule of rates, on the death of each member, happening during the membership of the assured, and a provision that such membership should cease upon failure to pay an assessment within the time required by the contract. The court held that the failure to pay, *ipso facto*, determined the membership, but left the member liable, nevertheless, for death losses which happened before such termination, whether assessments were made before or after that time. The decision went no further than the plain words of the contract, as under it the death of a member fixed the liability to pay an assessment, and there was an absolute promise to pay upon the happening of each such occurrence, while the assured remained in the company.

Further consideration of authorities is deemed to be unnecessary. We may safely venture to say that no case can be found, certainly none has been brought to our attention, which holds that a member of an insurance company can

escape payment of an assessment made during the life of his membership, where the contract contains an absolute promise to pay, or that supports the claim of liability for assessments made after the termination of the membership, where each call, under the scheme of insurance, is for the benefit of a policy fund out of which to pay death losses, and the liability is fixed by the assessment and notice instead of being made to pay particular death losses, and is fixed by the call for such purpose. All of the authorities cited on both sides, on both appeals, rightly understood, sustain the conclusions we have reached, that defendant was liable, under the plain terms of his contract of insurance, for the assessments made while he was a member, and not liable for those made afterwards. Such was the decision of the trial court. The judgment must therefore be affirmed on both appeals.

By the Court.— The judgment of the county court is affirmed.

---

99 319
101 188

99 319
115 382
115 562

CURRY, Appellant, vs. COLBURN and wife, Respondents.

March 26 — April 12, 1898.

Deed, delivery necessary: Evidence of.

1. No particular form is necessary to constitute the delivery of a deed. It is sufficient that the minds of the contracting parties meet, expressly or tacitly, in the intent to give it effect. Until delivered with such intent it never becomes operative.
2. The mere handing of a deed, which is not dated or acknowledged, to the grantee named therein at his request, to be examined by his lawyer, and the bargain to be completed at a subsequent meeting of the parties, is not such a delivery as will make it operative.
3. Parol evidence is admissible to show that a written instrument, although in the hands of the grantee, has never in fact been so delivered as to bind the parties.

APPEAL from a judgment of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Webster & Classon*, and for the respondents on the brief of *George G. Greene*, of counsel.

BARDEEN, J. The plaintiff brings this action in ejectment to recover possession of a tract of land in the city of Marinette. The answer is a general denial, and a counterclaim substantially to the effect that both parties claim title from one Fairchild, and that the deed under which plaintiff claims title was never in fact delivered to him with intent to pass title. A reply asserts the validity of plaintiff's deed, and that defendants took title with notice of the plaintiff's rights. The chief question litigated on the trial was whether the deed from Fairchild to plaintiff had ever been delivered. The court found that such deed was handed by Fairchild to plaintiff merely for examination and inspection, and was not delivered with the intention of passing the title. As conclusions of law, the court found that defendants were entitled to judgment dismissing the complaint and canceling said deed.

There is ample evidence to support the conclusions arrived at by the trial judge, and his findings of fact cannot be disturbed. The deed in question was not dated or acknowledged. It was simply handed to plaintiff by Fairchild, at the former's request, to be taken to his lawyer for examination, and the parties were to meet later to complete the bargain. No particular form is necessary to constitute the delivery of a deed. It is sufficient when the deed is executed, and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect. *Bogie v. Bogie*, 35 Wis. 659. Like every other contract, there must be a meeting of the minds of the contracting parties — the one to sell and convey, and the other to purchase and receive — before the agreement is consummated. *Welch v. Sackett*, 12 Wis. 243. The question of delivery is largely of

intention. 1 Devlin, Deeds, § 262. And a deed never becomes operative until it is delivered with the intent that it shall become effective as a conveyance. Id. Counsel for the plaintiff argue earnestly that, because the deed was handed by Fairchild to the plaintiff, this constituted a full and complete delivery, and that evidence was not admissible to show the actual condition then existing. No doubt, a great deal of discussion and unnecessary refinement may be found in the books, bearing upon this question; but the main principle must predominate, that, to constitute a valid delivery of a deed, the grantor must part with his dominion over it, with *intent to pass the title.*

The ancient rule that a deed cannot be delivered in escrow to the grantee in no way conflicts with our conclusions. A delivery in escrow contemplates complete loss of control over the deed. Here the incomplete deed was handed to the grantee, to take to his lawyer for inspection. By the terms of their agreement of sale, a mortgage was to be made, a party-wall contract was to be executed, and part of the consideration to be paid. There was nothing in the circumstances to show that Fairchild in any way intended to part with his dominion over the deed. On the contrary, they all tend to establish the conclusion arrived at by the trial court. That parol evidence is admissible to show that a written instrument has never been delivered so as to bind the parties thereto is established by the following cases: *Gibbons v. Ellis*, 83 Wis. 434; *Price v. Hudson*, 125 Ill. 284; *Brackett v. Barney*, 28 N. Y. 333; *Roberts v. Jackson*, 1 Wend. 478; *Reichart v. Wilhelm*, 83 Iowa, 510. In *Price v. Hudson* the court remark: "It is not competent to control the effect of the deed by parol evidence, when it has once taken effect by delivery, but it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered, unless the grantor, or those claiming through him,

are estopped in some way from asserting the nondelivery of the deed."

Not to prolong this discussion, we conclude that the decision of the trial judge upon the law finds ample support both upon principle and authority.

By the Court.—The judgment of the circuit court is affirmed.

---

99 322
111 [1]386

STATE EX REL. GERICKE, Appellant, vs. THE MAYOR AND COMMON COUNCIL OF THE CITY OF AHNAPEE, Respondents.

March 26—April 12, 1898.

Mandamus: *Municipal corporations, duty as to bridges.*

1. When an official act requires the exercise of judgment or discretion on the part of public officers, *mandamus* will not lie to compel performance thereof.
2. Although it is the duty of city officials, under sec. 1223, R. S. 1878, to construct and keep in repair bridges in their respective municipalities, and they have power, under secs. 1318, 1347, R. S. 1878, to levy taxes for that purpose, yet where a city has not sufficient funds in its treasury to repair a bridge, lawfully applicable thereto, and it appears to be a matter of discretion on the part of the city whether to repair the old bridge or to build a new one, *mandamus* will not lie to compel it to repair the old bridge.

APPEAL from a judgment of the circuit court for Kewaunee county: N. S. GILSON, Circuit Judge. *Affirmed.*

The facts of the case are stated in the opinion.

For the appellant there was a brief by *C. M. Scanlan*, attorney, and *V. W. Seely*, of counsel, and oral argument by *C. M. Scanlan.* Among other things, they argued that the grant of power to the city officials to keep the bridge in repair is for the public benefit, and its execution may be insisted on as a public duty. It is not discretionary. Buswell,

Personal Inj. § 171; *People ex rel. Burke v. Bloomington*, 63 Ill. 207; Lewis, Em. Dom. § 167; *Att'y Gen. v. Bay Co. Bridge Comm'rs*, 73 N. W. Rep. 901; *Comm'rs of Highways v. People ex rel.* 69 Ill. App. 326; Dill. Mun. Corp. §§ 98, 836, note 2; *State ex rel. Cleveland v. Orange*, 31 N. J. Law, 131; *Uniontown v. Comm. ex rel. Veech*, 34 Pa. St. 293; *Howe v. Comm'rs of Crawford Co.* 47 id. 361; *State ex rel. Roundtree v. Board of Comm'rs of Gibson Co.* 80 Ind. 478; *Richards v. Co. Comm'rs of Bristol*, 120 Mass. 401. The city had abundant resources to raise the money. *Carney v. Marseilles*, 136 Ill. 401; *Ivory v. Deerpark*, 116 N. Y. 476; *Eveleigh v. Hounsfield*, 34 Hun, 140; *Hutson v. New York*, 9 N. Y. 163; *Hines v. Lockport*, 50 N. Y. 236.

For the respondents there was a brief by *Cady & Cady*, of counsel, and oral argument by *F. C. Cady*.

CASSODAY, C. J. This is a proceeding by *mandamus*, commenced in September, 1896, to compel the defendants to repair a bridge across the Ahnapee river, within the city. The relation alleges, in effect, the want of repair; the necessity for the bridge; the injury to the relator and others in allowing it to remain out of repair; that it would cost less than $300 to repair the same, and that there was a sufficient amount of money, not otherwise appropriated, in the city treasury, to pay for the necessary repairs of the bridge; and that the defendants had refused, and still refuse, to repair the same, or cause it to be done.

The return consisted of admissions, denials, and counter allegations, and, among other things, alleged, in effect, that at the time of the service of the alternative *mandamus* the entire amount of money in the treasury of the city, for all purposes, was only $826.64; that, of such amount, $540 was raised for the special purpose of paying the semi-annual interest on railroad bonds which the city had previously issued, and was then, and still is, owing, and which interest became

due and payable November 1, 1896; also, $125 per month for September, October, and November, 1896, to pay for electric lights, and which payments were required to be made before any more money came into the city treasury, amounting to $375; and for monthly salaries of its officers, which the city was bound to pay, amounting to $150,—making the absolute obligations of the city, in the aggregate, $1,065, thus compelling the city to borrow money for running expenses to the amount of $300, which amount was still due, unpaid, and owing.

The relator replied to such return and took issue with the same.

At the close of the trial the court found, as matters of fact, in effect, that it was and is the duty of the city to keep its streets and bridges in safe and suitable repair; that the relator, a reasonable time before the commencement of this proceeding, requested the defendants to repair the bridge, and a number of the residents and taxpayers petitioned for such repair, but they voted against the same, and refused to make such repair; that if the defendant city had the money in its treasury, not otherwise appropriated, and not, in the reasonable judgment of the defendants, more necessary for other municipal purposes, sufficient for the repair of the bridge, their refusal to make the repair from June 4, 1895, to September 23, 1896, was an unreasonable and unnecessary length of time; that ever since June 4, 1895, the relator had been engaged in the lumber and general merchandise business on the street at the north end of the bridge, and had been the owner of real estate at such place; that while the bridge had been kept in repair he was doing a good business from both sides of the river; that since it became out of repair his trade had fallen off, and his real estate had depreciated in value in consequence of the failure to repair the bridge; that at least one other resident and property owner had been specially injured in his business and property by

reason of the bridge being and remaining out of repair; that the Ahnapee river is a navigable stream for some distance above the bridge, and the draw in the same had theretofore been too narrow for navigation, and so narrow as to prevent the dredges of the United States from passing up and down the river in case it became necessary to do government work above the bridge, and, in case of the improvement of the Ahnapee harbor to a point above the bridge by the United States, it would be necessary to replace the bridge with an entirely new one, of different construction, costing from $1,000 to $1,200; that the actual cost of repairing the bridge so as to make it reasonably safe and convenient for public travel, if hemlock lumber should be used, would be $296, but should the proper city authorities elect to use pine lumber, the cost would be $400; that the common council is authorized by its charter to levy a tax for general purposes not to exceed five mills on the dollar upon the assessed valuation of $410,000; that at the time this proceeding was commenced there was in the treasury of the city, for all purposes, only $826.64, which was in a general fund, but $550 of which was raised for the special purpose of paying semi-annual interest on railroad bonds of the city then and now outstanding, which interest became due and payable November 1, 1896, and before any other money would come into the treasury; that the city was then, and still is, bound by a written contract to pay for lighting the sum of $125 per month, and the payments for September, October, and November, amounting to $375, were required to be made before any money came into the treasury; that the city was also bound by contract to pay its officers certain salaries, aggregating $150; that the total expenditures required for those purposes was $1,065; that the city was compelled to, and did, borrow $300 for its ordinary running expenses; that the money in the treasury was applied by the city authorities

to payment of interest, lights, and salaries, as hereinbefore specified, so far as the same would go; that, in the judgment of the mayor and common council of the city, the best interests of the citizens of the city generally, and of the public, did not require the repair of the bridge, even were there sufficient funds with which to do so.

As conclusions of law the court found, in effect, that the city authorities had the right, in their discretion, to apply the money so in its treasury for the purposes set forth in such findings of fact; that at the time of the service of the alternative writ the city did not have sufficient money in its treasury, properly applicable thereto, to repair the bridge; that the relator was not entitled to a *mandamus* as prayed; that the defendants were entitled to judgment dismissing the relation and alternative writ, with costs.

From the judgment entered accordingly the relator brings this appeal.

The facts found by the court appear to be supported by the evidence. It is undoubtedly true that when administrative officers refuse to perform a mere ministerial duty imposed upon them by law, and which they are thereby bound to perform without further question, then, if they refuse, a *mandamus* may issue to compel them to perform such duty; but, when such official act requires the exercise of judgment or discretion on the part of such officers, then a *mandamus* will not be granted. *State ex rel. Wolff v. Board Sup'rs of Sheboygan Co.* 29 Wis. 84; *State ex rel. Comstock v. Joint School Dist. No. 1*, 65 Wis. 637; *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 501; *U. S. ex rel. Dunlap v. Black*, 128 U. S. 40; *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636; *U. S. ex rel. Boynton v. Blaine*, 139 U. S. 306. Undoubtedly, it is the duty of municipalities to construct bridges, and keep the same in suitable repair. R. S. 1878, sec. 1223. But such duty does not deprive the officers of such

municipalities from exercising some judgment or discretion as to the time and manner of making such construction or repairs.

In the case at bar the city authorities were authorized to levy a tax to make such repairs, but not to exceed $300 for any one bridge in any one year. R. S. 1878, secs. 1318, 1347. They certainly were not bound to repair the bridge at their own expense, nor under circumstances which would preclude them from making the city liable for the cost of the work. *State ex rel. Winslow v. Mt. Pleasant*, 16 Wis. 613. To authorize this *mandamus*, the relator was bound to allege and prove that at the time of the service of the writ the city had sufficient funds in its treasury to repair the bridge, and which could be lawfully applied to that purpose, and that there had been unreasonable delay in making such repair. *Orth v. Milwaukee*, 59 Wis. 336, 339. Besides, upon the facts found, it would seem to have been a matter of judgment and discretion on the part of the defendants as to whether they would repair the old bridge or build a new bridge.

By the Court.—The judgment of the circuit court is affirmed.

ESTATE OF ROBINSON, Respondent, vs. HODGKIN, Executor, Appellant.

March 26—April 12, 1898.

Estates of decedents: Accounting by executor: Appeal.

1. The fact that a testator has made his debtor the executor of his will does not discharge the debt, if the creditors of the estate will be injured thereby, or if the will shows any intention to the contrary. The debt will be deemed assets in the hands of the executor, as if the money had been paid to him, and he cannot escape liability therefor by failing to charge himself with it in his in-

ventory. Expressions to the contrary in *Lynch v. Divan*, 66 Wis. 400, disapproved.

2. Upon an accounting by an executor as to an estate which consisted in part of a lease of a homestead and a lot adjoining it on which was a saloon, for a gross sum, *held*, that the practical construction put upon it by the testator and the tenant and the executor, in considering the value of the rental of the saloon to be one half of that gross sum, should be placed upon it by the court and the executor be charged with one half that sum.

3. On appeal in the matter of an accounting by an executor, an order that he charge himself with an error in the footings of his account was reversed, no such error appearing in the record.

4. Where the executrix of one estate contested the final account of the executor of another estate, claiming the right to do so as a creditor, not in her own name as personal representative, but in the name of the "estate" represented by her, *held*, that the error was immaterial.

APPEAL from a judgment of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Affirmed in part; reversed in part.*

This is an appeal from a judgment correcting and surcharging an executor's final account. It appears by the evidence that Herman Hodgkin died at Fond du Lac, July 8, 1893, leaving a will devising his property, real and personal (after payment of his debts), to the appellant, *Horace Hodgkin*, who afterwards probated the will and accepted the trust. The testator left two heirs at law, viz. the said *Horace Hodgkin*, his son, and one *Mrs. Selina Robinson*, his daughter. The testator's property consisted of a small homestead and a small lot adjoining, with a saloon building upon it; also a small amount of personal property. Among the personal property was a note executed by *Horace Hodgkin*, dated October 29, 1892, for $240, with a payment of $25 indorsed thereon.

There was testimony to the effect that shortly before his death the testator told his granddaughter, Mrs. Annette Brown, that he wanted her to have everything in his room,

and that the note was then in his room, with other papers. No delivery of any kind was made, however, and Mrs. Brown took none of the papers or property before the testator's death, but afterwards took the papers, including the note. Some months afterwards, however, upon advice of counsel, she surrendered the papers and note to the appellant as executor, and he has ever since retained them. The executor did not include the note in his inventory. During the settlement of the estate, S. P. Robinson (husband of *Selina*) presented a large claim against the estate. It was contested, and the trial resulted in a judgment for Robinson of over $900 in May, 1895. S. P. Robinson died testate in October, 1895, and *Selina* became the duly-qualified executrix of the will. No part of the judgment has been paid.

March 23, 1896, the appellant, *Hodgkin*, presented his final accounts as executor, showing a balance in his hands of $85.55. Objections were filed to this account by the "Estate of S. P. Robinson," claiming that the executor should charge himself with his note of $215 and interest; also with $8 per month for rental received from the saloon, instead of $5 per month as charged in the account; also with some other items unnecessary to be stated. The county court found against the executor, and surcharged the account to the amount of the note and the rental, and also charged the executor with $50 error in footing the account. Upon appeal the circuit court came to the same conclusions as the county court, except as to one item of $15, and surcharged the account in the same respects, and also taxed costs against the executor personally. From this judgment the executor appealed.

For the appellant there was a brief by *Martin & Gooding*, and oral argument by *Maurice McKenna*.

For the respondent the cause was submitted on the brief of *Elihu Colman*.

WINSLOW, J. There is but one serious question arising in this case, and that is whether the executor should be charged with his own note, given to the deceased in his lifetime. The note was in the possession of the deceased at the time of his death, and afterwards came to the hands of the executor, but he did not include it in the inventory, nor did he charge himself with it in his final account. It may be inferred from these facts that the executor claims that this note has been paid, or that he has some defense to it, although no such claim is directly made in any pleading in the case. It is enough to say that the evidence amply justifies the finding that the note belonged to the estate, and had not been paid except as to the $25 payment indorsed upon it. But it is said that it cannot be regarded as money in the hands of the executor, nor charged against him upon the accounting, but that the question whether the executor was a debtor of the estate could only be determined in some direct proceeding brought against him, and reliance is placed upon the case of *Lynch v. Divan*, 66 Wis. 490, to support this contention.

When a creditor makes his debtor the executor of his will, the right of action for the debt is said to be discharged, for the reason that the executor cannot sue himself. But, while this is so, the debt itself cannot be said to be discharged in any case where creditors of the estate will be prejudiced, nor where the will shows an intention that the debtor is not to be discharged. In all such cases, at least, the rule is well settled in Massachusetts, and has been adopted in this state, that the note or security becomes assets in the hands of the executor, for which he must account. In the judgment of the law the debt is to be considered as having been paid to the executor, and to be treated as money in his hands. *Stevens v. Gaylord*, 11 Mass. 256; *Winship v. Bass*, 12 Mass. 199; *Finch v. Houghton*, 19 Wis. 149. Nor can the executor escape this liability by failing

to charge himself with the debt in his inventory. *Tarbell v. Jewett*, 129 Mass. 457; 2 Williams, Ex'rs (7th Am. ed.), 624, 629. It is not believed that it was the intention of this court to depart from this doctrine in *Lynch v. Divan*, *supra*, and any expressions in the opinion in that case which are at variance with the doctrine must be considered as disapproved. That case was an application to compel a debtor executor to pay a debt proven against the estate out of the debts of the executor to the estate, a large part of which appeared on their face to be outlawed, and the question of the liability of the executor never having been determined by any accounting or other proceeding of a similar nature. It may well be that upon such a summary proceeding the court would not be justified in treating the executor's obligation as assets in his hands. But where, upon final accounting, the whole question is open, and any defense which the executor may have can be tried and determined, if it be found that the debt existed, there seems no good reason why it should not be considered as money in the hands of the executor, in accordance with the doctrine above cited. This necessarily results in an affirmance of the decision of the circuit court on the question of the accountability of the executor for the note.

As to the item of $102 which the judgment directs the executor to charge himself with on account of rent received for the saloon, there can be little question. The saloon and homestead were rented together by the deceased for the gross sum of $16 per month. There was evidence showing that the deceased and the tenant and the executor himself considered that the rental of the saloon amounted to half of this sum, although the lease itself did not specify what part of the rent was for the saloon and what part for the house. The executor only charged himself with $5 per month, although he received the entire sum. Under these circumstances, we think the practical construction which the parties

had given the lease controls, and that the conclusion of the trial court was correct.

There is absolutely no evidence that there was any error of $50 in the footings of the executor's account as the account appears in the record. If there ever was any such error, it must have been corrected in the county court upon the account itself; and there are some indications that this was the case. Certainly, there is no error in the footings of the account as returned in the record, according to any of the rules of arithmetic with which this court is familiar. Doubtless, this erroneous finding was a simple oversight, which would have been corrected if it had been brought to the attention of the trial court.

The circuit court found that the appeal from the county court to the circuit court was taken in bad faith, and hence rendered judgment against the executor personally for the costs. We are unable to say that this finding was not sustained by the evidence.

It is objected that the "Estate of S. P. Robinson" is not the proper party, but that the personal representative of the estate should have been named as the party plaintiff. It appears that the executrix was the party who actually made the contest, and that the defect is one of nomenclature simply. We do not regard the error as of substantial importance.

By the Court.— That part of the judgment which orders the executor to charge himself with $50 error in footing is reversed, without costs, and the balance of the judgment is affirmed, with costs, to be recovered against the appellant personally.

99 333
f102 305
s104 40

99 333
112 s220

99 333
e113 67

99 333
115 546

SCHAEFER, Respondent, vs. THE CITY OF FOND DU LAC, Appellant.

SAME, Appellant, vs. SAME, Respondent.

March 28 — April 12, 1898.

Street railways: Liability for injury by defective track: Primary liability: Lessor's liability: City's liability: Res adjudicata.

The street railway company in the defendant city so constructed and maintained its railway track on one of the streets of such city as to render such street defective and dangerous for public travel. While such condition existed, Elihu Colman, with knowledge of the facts, purchased the railway track and left the same in possession of the railway company under an option to purchase the property, but without any agreement binding the railway company to remedy the defective condition of the street. While such condition of things existed, the plaintiff, lawfully traveling on such street at the point of danger, without fault on his part, was injured by reason of such condition. Plaintiff thereafter gave due notice of his injury to the defendant city, and thereafter prosecuted an action against the railway company to judgment, for his damages. The company, pending the suit, notified the defendant herein of the action, in order that it might defend the same. After exhausting all legal remedies against such company, plaintiff sued the defendant city, setting up the proceedings in the first suit and the fact of failure to collect the damages from the railway company after exhausting all legal remedies to that end. In the second suit it was claimed that the defendant city was bound by the judgment in the first suit, as to the defective condition of the street, the happening of the accident, and the amount of damages. Defendant pleaded and insisted, among other things, that Elihu Colman was primarily liable for the damages, and that the exhaustion of all legal remedies against him was a condition precedent to the right of plaintiff to proceed against the defendant city. Plaintiff recovered judgment, but for a less sum than in the first suit, the court holding that Colman was not primarily liable and that defendant was not bound by the former proceedings. On appeals by both parties, *held:*

(1) That Colman, and the railway company as well, were primarily liable to plaintiff, and that the exhaustion of all legal remedies as to both was a condition precedent to the right of plaint-

iff to proceed against the city under the charter thereof, which provides that in such cases the city shall not be liable till all legal remedies shall have been exhausted to collect the damages from the person or corporation whose wrong or neglect produced or caused the defective condition of the street.

(2) That the right to recover of the city is a creature of the statute, hence the legislature may grant the right, take it away, or make the exercise of it contingent upon the performance of such conditions as in its wisdom may be deemed best, and without any warrant for holding that the law in that regard is unreasonable. Such legislation, being in derogation of the common law, should be construed most favorably to the public corporation, and not the claimant for damages.

(3) If property, when in such defective condition as to be dangerous to persons lawfully in the vicinity thereof, be purchased by a person with knowledge of the facts, who leases it to another, especially if the lease does not contain a clause requiring the lessee to remedy the defects, and a person so lawfully in the vicinity of such danger, but having no connection whatever with such lessee, be injured thereby, such lessor is liable to such injured party; he cannot escape liability from the mere fact of the lease to, or possession by, such other person.

(4) The doctrine that where a person against whom suit is brought to recover damages is entitled to indemnity from another in case of being compelled to pay such damages, such other is bound by the judgment against such person if he be notified of the pendency of the suit and has an opportunity to defend against the same, does not apply to the facts of this case. The judgment against the indemnitee in such a case is binding on the indemnitor, but if the latter be first sued the judgment in a subsequent suit by the same plaintiff against the indemnitee will not affect the plaintiff as to any question litigated in such first suit.

[Syllabus by MARSHALL, J.]

APPEALS from a judgment of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of the defendant.*

Action to recover compensation for personal injuries alleged to have been caused by a defective street in the city of *Fond du Lac.* The date of the injury was June 25, 1895. The defective character of the street grew out of the manner

in which the street-car track was originally constructed, and was maintained, in the street in question. The Fond du Lac Light, Power & Railway Company constructed the track, owned it till the 28th day of December, 1894, and operated the railway up to and inclusive of the time of the injury. Suit was first brought against the company, and such proceedings were had therein that all the facts requisite to a recovery were found in plaintiff's favor. The damages were assessed at $2,063.21. Judgment was entered accordingly, on which execution was duly issued and returned unsatisfied.

After the action was brought against the railway company, it notified the city of *Fond du Lac* of the pendency of the action in order that the city might defend the same. After the return of the execution as aforesaid, this suit was commenced. The complaint contained appropriate allegations to make a cause of action, including appropriate allegations to show that plaintiff had exhausted his legal remedy against the railway company, which was claimed to be the person primarily liable for the injury. The amount recovered in the first case was duly set forth in the complaint. The defendant answered, taking issue on the allegations in regard to the sufficiency of the street, the cause of the injury, and the amount of the damages. The answer also contained allegations to the effect that Elihu Colman was the owner of the road at the time of the accident, and a person primarily liable for the injury, and that no effort had been made to collect of him.

On the trial there was evidence tending to prove the allegations of the complaint in respect to the defective condition of the street, the injury, the damages, the action against the street railway company as the party primarily liable, and the amount recovered in such action. Proof was made also of the other allegations of the complaint, requisite to entitle plaintiff, *prima facie*, to recover. The evidence showed that plaintiff was endeavoring to drive his team across the track,

he standing on a high load of lumber; that he had a stake in a fixed position, where he could take hold of it to steady himself; that when his wagon struck the defects in the street he was suddenly jerked and compelled to take hold of the stake, which broke, and he was precipitated to the ground, causing the injuries complained of. The evidence tended to show that the defective condition of the street existed on the 28th day of December, 1894, and continuously thereafter up to the time of the accident; that on the day named the street railway track, as it lay in the street, and the road-bed, and some other property of the company, was duly conveyed by sheriff's deed to Elihu Colman, but that there was a verbal understanding between him and the street railway company that it was to have the property back upon complying with certain conditions of purchase; that it continued to operate the road after the sale to Colman, till after the happening of the injury to plaintiff, under an option to purchase the property; that the option was never accepted, and that Colman finally took up the track.

On the evidence the defendant moved the court for a verdict in its favor, which was denied, and the ruling duly excepted to. A special verdict was thereupon ordered on defendant's motion. The jury found that June 25, 1895, at the time the plaintiff was injured, Main street, where the injury occurred, was in an unsafe condition for travel; that plaintiff was thrown from his wagon and injured in consequence of such defective condition of the street; that the city had notice of such defective condition of the street for a sufficient length of time, by the exercise of reasonable care and diligence, to have discovered and remedied the defects; that the plaintiff was free from contributory negligence; that he was damaged to the extent of $800; that notice of the injury was given to the proper officers of the defendant as required by law. The jury also found, by order of the court, that the defective condition of the street

was not caused by, nor did it arise from, any wrong, default, or negligence of Elihu Colman.

Defendant's counsel moved the court to set the verdict aside and grant a new trial, which was denied. Plaintiff moved the court for judgment for the amount due upon the judgment in the first action, which was denied. Judgment was thereupon perfected for $800 and costs. Both parties appealed.

Edward S. Bragg, for the plaintiff.

Edward W. Phelps, attorney, and *Maurice McKenna*, of counsel, for the defendant.

MARSHALL, J. At the outset, the question of the liability of Elihu Colman is of paramount importance. It stands without question on the record that he was the owner of the street-car track at the time of the injury complained of, and had been such for several months prior thereto; that the defective condition of the street existed when he purchased the property; that he then knew of the facts; that the railway company occupied and used the property the same after such purchase as before, but pursuant to an option to buy it back, the particulars of which option were not testified to. The learned circuit judge decided as a matter of law, on such facts, that Colman was not liable for the injury to plaintiff, because the defects in the street were not caused by, nor did they arise from, or were they produced by, him. That reasoning hardly meets the facts of this case fully. It leaves out the element that Colman continued the defective condition of the street by allowing the railway company to hold under him without any covenant on its part to remedy such condition. With the added element, the decision has some support by some things said in *Fellows v. Gilhuber*, 82 Wis. 639, where the awning in front of an hotel was thrown down, partly through defects existing in one of the supporting posts, whereby a guest at the hotel, standing on the walk, was in-

jured, the hotel being in possession of a lessee, and the defect existing with knowledge of the landlord when the lease was made. It was held that the lessor was not liable, but the decision was put on the ground that there was an agreement in the lease which obligated the lessee to repair. Upon that theory the decision is in accord with much authority in this country and England, but it must be said there is much authority of a very respectable character against it. Whatever is said in the opinion, however, that may be read to support the proposition that the rule that a landlord who leases dangerous premises, knowing, or with means of knowledge, of such dangers, without any covenant to repair on the part of the lessee, is not liable to the tenant or subtenant holding under the first lessee, or any person having business connection with the property, under the tenant, injured by such dangers, applies to cases arising between the landlord and a mere stranger lawfully in the vicinity thereof, and injured thereby, must be considered as *obiter* and the decision read as applying only to the facts of the particular case.

The law is firmly established by the great weight of authority, that, as between the owner of leased property and a mere stranger, the owner is liable for an injury to the latter, caused by a dangerous defect in the property existing at the time of the lease, unless protected by a covenant binding the lessee to remedy such defects; and there is much authority that he is liable anyway, that is, that he cannot shift the liability for known existing dangers onto the lessee by a covenant to repair. But there is no necessity for discussing the conflict in that regard, in this case, for there is nothing in the record to indicate that the railway company was under any obligation to Colman to repair the defects in the street caused by the railway track. So far as appears from the evidence, the company continued in possession of the property without any agreement other than a mere option to purchase.

Authorities which apply to the facts unfavorably to plaintiff are very numerous, and without substantial conflict. We will cite but a few of them. In *Conhocton Stone Road v. B., N. Y. & E. R. Co.* 51 N. Y. 573, defendant demised premises, in a dangerous condition, and was held not liable *for want of notice of the defects at the time of the demise, or thereafter, prior to the injury.* In *Ahern v. Steele*, 115 N. Y. 203, defendants became the owners of a defective pier, subject to an outstanding lease which contained no covenant to repair. The defects antedated the lease. They were created and existed before the property came to the defendants. The court held that defendants were not liable for the injury caused by such defects, though solely *on the ground of want of notice.* To the same effect are *Irvine v. Wood*, 51 N. Y. 224, and *Swords v. Edgar*, 59 N. Y. 28. In *Albert v. State*, 66 Md. 325, the following instruction given in the trial court was approved, the action being to recover damages sustained by a minor through the death of his parents, caused by a defective wharf occupied by the defendant's tenant: "If the jury find that the defendant was the owner of the wharf, and that he rented it out to the tenant, and at the time of the renting the wharf was unsafe, and that the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, then the plaintiff is entitled to recover." To the same effect are *Knauss v. Brua*, 107 Pa. St. 85; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *Dalay v. Savage*, 145 Mass. 38; *Nugent v. B., C. & M. R. Co.* 80 Me. 62.

The rule appears to be very firmly established as above indicated, that under circumstances such as mentioned in the foregoing authorities, there being no covenant to repair or remedy defects on the part of the tenant, the liability of the owner for injuries thereby received turns on knowledge, or reasonable means of knowledge, of the existence of the defects on the part of such owner. Probably no case can be found that more nearly touches this at every point than

Dalay v. Savage, supra. There the defendant purchased premises abutting on a public way, having a defective coal hole in the sidewalk appurtenant to the premises, which caused the injury. Defendant had a right to the possession, but, instead of asserting it, left the person in possession who was there at the time of the purchase, as a tenant at will, without any agreement to repair the coal hole. It was held that the defendant was liable.

Further citations appear to be unnecessary. The rule on which they proceed is quite elementary, and may be stated thus: If a person purchases premises which are in a defective condition, with knowledge, or reasonable means of knowledge, of the defects, and then leases the same to another, or allows such other to hold possession of such premises under such conditions as to indicate permission to continue the defects, and a third person having no connection with such other, without fault on his part, is injured by reason of such defects while rightfully in the vicinity of the danger, such purchaser is liable to respond in damages to such third person for such injury.

Applying the foregoing to this case, it must be held that Colman, by reason of his ownership of the property and knowledge of its dangerous condition when he purchased it and up to the time of the injury complained of, was liable to the plaintiff. His allowing the railway company to remain in possession, especially without any agreement on its part to repair the street, did not operate to relieve him from responsibility. As said in *Dalay v. Savage*, 145 Mass. 38, that the railway company was also liable, is no defense for Colman, who held the title and was the actual owner of the property.

There is nothing in the foregoing inconsistent with what was decided in *Fellows v. Gilhuber*, 82 Wis. 639, or *Dowling v. Nuebling*, 97 Wis. 350. In the latter case the contest was between the landlord and his tenant.

What has preceded leads to a consideration of whether

Colman was a party "*primarily liable*" within the meaning of the charter of the defendant city, which provides that, "in case of injury or damage by reason of insufficient, defective or dangerous conditions of streets, not included in sidewalks, produced or caused by the wrong, neglect of duty, default, or negligence of any person or corporation, such person or corporation shall be primarily liable for damages for such injury in a suit for the recovery thereof by the person sustaining such damages, and the city shall not be liable therefor until all legal remedies shall have been exhausted to collect such damages from such person or corporation." The words "primarily liable" have a very definite and certain meaning. The section in which they are used does not create the liability, nor is there any statute liability on the subject. *Toutloff v. Green Bay*, 91 Wis. 490; *Cooper v. Waterloo*, 88 Wis. 433. They refer to the common-law liability that exists against the wrongdoer and renders him liable to the injured person, and over to the city in case of a recovery against it on the statutory liability, hence the words obviously include all persons liable at common law for the wrong. They would include persons made liable by statute as well, if any such existed.

It is argued that such construction of the statute throws much embarrassment in the way of recovering from municipal corporations in such cases as this, because it requires great caution in order to bring into the first controversy all persons liable for the injury, other than the city, who are so circumstanced as to be liable to indemnify it. That is hardly a sufficient reason for adopting a different construction, even if the language were of doubtful meaning. There is no liability on the part of the municipal corporation at all, independent of the statute. The law creating the right, being in derogation of the common law, is to be strictly construed in favor of the public corporation, not in favor of the claimant for damages. The section under consideration,

while it regulates the remedy, bears on the right as well, hence comes within the rule stated. Taken in connection with the statute creating the municipal liability, it makes that contingent on a previous exhaustion of all legal remedies against the persons or corporations whose wrong, neglect of duty, default, or negligence produced or caused the defective condition of the street. It is wholly in the power of the legislature to give the right or take it away, or make it contingent on the performance of such conditions precedent as in the wisdom of legislative power seems best, and without any ground for contending that the legislation in that regard is unreasonable.

It follows from the preceding, on the undisputed evidence in the case, that plaintiff ought not to have recovered, because of failure to prove performance of the condition precedent, requiring plaintiff to exhaust all legal remedies against the persons primarily liable, before proceeding against the city. The condition was properly pleaded and insisted upon at the trial.

It is contended that the verdict was contrary to the evidence on that subject of contributory negligence. Any discussion of that appears to be unnecessary. Suffice it to say, however, that a consideration of the evidence preserved in the record leads to the conclusion that the question was properly submitted to the jury.

It is further contended on plaintiff's appeal, that the court erred in not limiting the defendant, in making its defense, on the theory that the recovery against the railway company was conclusive on the city as to the injury, the cause of it, the amount of damages, and notice to the city. That was pressed on the attention of this court with much earnestness and learning by the eminent counsel who argued the plaintiff's side of the case, and many authorities were cited in support of the position, all of which have been carefully considered, and none of which, in our judgment, fits the facts

before us. The doctrine that where a person is responsible over to another who is sued, either by operation of law or express contract, and such person is duly notified of the pendency of the suit and requested to take upon himself the defense of it, the judgment is conclusive against him whether he appears or not, is quite familiar. That is the doctrine which the learned counsel invoked to sustain his contention that the judgment against the railway company is binding on the defendant city. In *Boston v. Worthington*, 10 Gray, 496, recovery was first had of the plaintiff by the injured party; then such party sued the defendants for indemnity, they having created the danger which caused the injury. They were given notice and opportunity to defend in the first case, but declined to do so. The court held that they were bound by the judgment in such first case. In *Littleton v. Richardson*, 34 N. H. 179, plaintiff town was sued by a person who was injured by obstructions placed in the highway by another. Such other had an opportunity to defend. Recovery was had of the city, whereupon it sued such other for indemnity for the loss. There was the same situation in *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Lowell v. B. & L. R. Corp.* 23 Pick. 24; *Robbins v. Chicago*, 4 Wall. 657, and several other cases cited by counsel, and many more that might be added, in all of which it was held that the judgment in the first case was conclusive against the defendant in the second. It is clear that to make the doctrine under discussion apply the person first sued must have a right of action over against another for indemnity in case of loss. The conclusive character of the first judgment is only where the person first sued, himself becomes a plaintiff against the indemnitor, to recover over for the loss sustained by being compelled to pay in the first case. Here we are asked to apply it, not in favor of the indemnitee who has paid the loss, against the indemnitor, but against the indemnitee in favor of a person who had a right of action against both the

indemnitor and the indemnitee. No precedent for that, we may safely venture to say, can be found in the books. Certainly, none was cited by counsel.

The result of the foregoing is that the trial court rightly held that the defendant was not concluded on any question in respect to its liability, by the judgment in the action against the railway company, and erred in deciding that Colman was not a party primarily liable within the meaning of the city charter. Therefore both appeals must be decided in favor of the defendant, and the judgment reversed accordingly and the cause remanded for a new trial.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

BASSETT, Appellant, vs. BASSETT, Respondent.

March 28 — April 12, 1898.

99 344
108 80
99 344
112 318

Divorce: Additional judgment for alimony.

Unless the decree, in an action for divorce and alimony, not only grants the divorce, but gives alimony or makes an allowance for the wife, the court has no power under sec. 2369, R. S. 1878, afterward to open the judgment or to make any additional judgment for alimony. Expressions to the contrary in *Cook v. Cook*, 56 Wis. 195, and *Crugom v. Crugom*, 64 Wis. 253, overruled.

APPEAL from an order of the county court of Fond du Lac county: A. E. RICHTER, Judge. *Reversed.*

In May, 1889, plaintiff filed a complaint for divorce against defendant in county court, Fond du Lac county, alleging sufficient grounds therefor, and also setting out his property interests and income, and demanded a share of his property as alimony. Pending the suit, she obtained an order for temporary alimony and suit money; and, upon his neglect

to comply therewith, she sought to have the defendant punished for contempt. The contempt proceedings were dismissed, and on May 20, 1889, plaintiff was granted an absolute divorce; but no provision of any kind was made in the judgment for alimony, and no division of property was made. In September, 1897, the plaintiff filed a petition to open the judgment, and to procure an additional judgment for alimony, setting out that defendant was the owner of the same property described in the complaint, and that she was in needy circumstances. An order to show cause was issued, and, upon hearing of the same, the county court found that this was a proper case in which to allow alimony, and fixed a date for hearing proofs for the purpose of fixing the amount of alimony and the terms of such further additional judgment. The defendant filed his exceptions, and appealed to this court from the order so entered.

Edward S. Bragg, of counsel, for the appellant.

For the respondent the cause was submitted on the brief of *DeW. C. Priest.*

BARDEEN, J. The question involved in this appeal is new and interesting, and is raised for the first time in this court. It depends largely, if not entirely, upon the proper reading and construction of sec. 2369, R. S. 1878, which is as follows: "*After a judgment providing for alimony or other allowance for the wife and children*, or either of them, or for the appointment of trustees as aforesaid, the court may from time to time, on the petition of either of the parties, revise and alter such judgment, respecting the amount of such alimony or allowance, and the judgment thereof, . . . and may make any judgment respecting any of said matters which such court might have made in the original action. But when a final division of the property shall have been made under the provisions of section 2364, no other provision shall be thereafter made for the wife." The nature of the

judgment and any power of the court over it must be determined by the proper construction of this statute. Except in cases coming within some statutory power, it is the settled law of this state that the courts have no power to revise, alter, or set aside their judgments after the term at which they were rendered. *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265; *Salter v. Hilgen*, 40 Wis. 363; *Bacon v. Bacon*, 43 Wis. 197; *Day v. Mertlock*, 87 Wis. 577. And this rule applies to all matters on which the mind of the court did act, or is presumed from the record to have acted, in the rendition of the judgment; else, there might never be an end of litigation.

The courts in this state have no common-law jurisdiction over the subject of divorces, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute. *Kempster v. Evans*, 81 Wis. 247. This is also the rule in New York. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. Another proposition quite firmly settled by the adjudications in this state is that the revisory power of the court under this section is always open when the court has, in the first instance, granted alimony or made some allowance short of a final division of the husband's property. *Campbell v. Campbell*, 37 Wis. 206; *Cook v. Cook*, 56 Wis. 195; *Blake v. Blake*, 75 Wis. 339. These decisions recognize the fact that the power of the court in this respect is limited and environed by the letter of the statute, and cannot be exercised except in cases that come plainly within its terms. Mr. Justice TAYLOR, in a concurring opinion in *Cook v. Cook*, however, seems to have lost sight of the limitations which bind the courts. He there makes the broad statement that "the power of the court to award alimony to a wife in a divorce suit does not depend on the fact that some alimony was awarded at the time the judgment of divorce was granted." He was somewhat cautiously followed by Chief Justice COLE in *Crugom v. Crugom*,

64 Wis. 253. In that case, as in this, the judgment was silent as to alimony, and the record did not show that any claim was made by the wife for alimony. The learned chief justice says: "The tendency of the decisions to which we have referred clearly is that the court has the statutory power to award alimony, though the judgment for divorce, long since rendered, does not mention it." But in every decision to which he makes reference some provision had been made in the original judgment for the wife, short of final division of the property.

In the case at bar, the plaintiff, in her complaint, demanded an allowance as alimony or a division of the property. She sought the enforcement of a preliminary order requiring the defendant to pay alimony, but was defeated. She then took her judgment, which was silent as to alimony. The law presumes that every question involved in the action was passed upon by the court; and the judgment became final, not only as to the matter actually determined, but as to every other matter which the parties might, under the pleadings, have litigated in the cause. *Kamp v. Kamp*, 59 N. Y. 212. So when the plaintiff took her judgment without securing the rights she might have obtained under the pleading, it may well be claimed that the judgment stands *res adjudicata* for all time. But, were this not so, we still think she is remediless under the statute. It says: "After a judgment providing for alimony, or other allowance for the wife and children, or either of them," the court may revise and alter the same. The policy of the law is that judgments once solemnly entered shall be final and conclusive, and, when the term is ended, the record is in the roll, and not in the breast of the judges. Under the statute, what judgment is it that may be altered and revised after the term? Clearly, only such a judgment as shall have made some provision for alimony or allowance to the wife. By expressly granting the authority to revise or alter a par-

ticular judgment, it impliedly prohibits the exercise of that power as to any other judgment. We therefore desire to say with as much emphasis as we may that, under this section of the statute, the trial court has no power to alter or revise a judgment for divorce unless the judgment itself shows that some provision was made for alimony, or some allowance made to the wife. Whatever was said in the *Crugom Case* or prior cases in conflict with this construction must be deemed to be overruled. The conclusion arrived at seems amply sustained by a reading of other sections of the statutes relating to divorce.

By the Court.— The order of the county court of Fond du Lac county is reversed, the defendant to pay clerk's fees and cost of printing plaintiff's brief.

BRAGG, Respondent, vs. BLEWETT, imp., Appellant.

99 348
103 9

March 28 — April 12, 1898.

Appeal, parties to.

1. B. assigned to E. a judgment owned by him, in trust to pay his indebtedness to E. and to some other creditors. E. commenced a creditor's action, making B. and the debtor in such judgment and others parties defendant. A receiver appointed in that action sued H. and others to foreclose a mortgage acquired by him as such receiver, making B. a party. Orders were afterward made in both actions ratifying the report of the receiver and discharging him and his bondsmen. *Held*, that B. could not, by a notice of appeal entitled in the creditor's action, appeal from both orders, but the appeal in the action against H. must be dismissed.
2. In the creditor's action brought by E. the defendant B. suffered judgment by default, and the suit was afterward settled between the plaintiff and the only defendant having any interest therein, and the report of the receiver who carried the settlement into effect was approved, and he and his bondsmen discharged. *Held*, that the defendant B. was not "aggrieved" within the meaning of sec. 3048, R. S. 1878, and could not appeal from the order.

APPEAL from orders of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Appeal dismissed.*

The facts in the case are fully stated in the opinion.

E. Blewett, appellant, *in pro. per.*, argued, among other things, that a receiver is an officer of the court and directly responsible to it, and neither the plaintiff nor the defendant, nor any other person, can deprive the court of its possession or control of the property involved. *Neeves v. Boos*, 86 Wis. 318; *Mechanics' Nat. Bank v. Landauer*, 68 id. 49; *Ahlhauser v. Doud*, 74 id. 413. A receiver will not be discharged from his trust without a special order to be obtained upon the written consent of all the parties interested in the funds in his hands, or for cause shown upon due notice of the application. Circuit Court Rule XXVIII, sec. 2. He will not be discharged upon application of the party at whose instance he was appointed, when the interests of others are involved. High, Receivers, § 837; *Fay v. Erie & K. R. Bank*, Harrington (Mich.), 194; *Bainbridge v. Blair*, 3 Beav. 421; *Largan v. Bowen*, 1 Sch. & Lef. 296. An appeal will lie from an order settling the receiver's accounts and discharging him. High, Receivers, § 819*b*; *Honey v. McDonald*, 109 U. S. 150; *Collins v. Case*, 25 Wis. 653.

Edward S. Bragg, respondent, *in pro. per.*

CASSODAY, C. J. Early in 1890 the defendant *Edmund Blewett* commenced an action against the defendant James Gaynor. James Gaynor therein claimed that his brother, the defendant Patrick Gaynor, was interested with *Edmund Blewett* in the cause of action, and Patrick Gaynor was thereupon made a co-plaintiff in that action. On March 31, 1890, a judgment for $8,114.50 was recovered against James Gaynor in the circuit court for Winnebago county in that action, which judgment was duly docketed in the clerk's office of that county April 3, 1890. A transcript thereof was duly docketed in the clerk's office of Fond du Lac county. On

July 19, 1890, two several executions were duly issued upon said judgment, one to the sheriff of Fond du Lac county, and the other to the sheriff of Winnebago county. Each of said executions was duly returned *nulla bona*. Said judgment was taken to this court on appeal, and affirmed. *Blewett v. Gaynor*, 77 Wis. 378.

On the same day that that judgment was rendered in the circuit court — March 31, 1890 — the defendant *Edmund Blewett*, for a good and valuable consideration, by an instrument under his hand and seal, did sell, transfer, and assign to the plaintiff, *Edward S. Bragg*, in trust, the said judgment, with such costs as should be taxed and made a part thereof, for the uses and purposes following, to wit: (1) The payment of the costs and disbursements of that action, with all the attorney fees, costs, and disbursements, together with all counsel fees and charges due and owing for services, etc., rendered in that and in kindred actions of foreclosure by Mrs. Gaynor, of replevin by Pat Gaynor and by himself, *Edmund Blewett*, against John Weiner; (2) the payment to persons thereinafter named such sums as he might be owing, which was therein stated opposite their names as nearly as he was then able to state the same, viz.: To Thomas Blewett, $2,500; F. F. Duffy, $160; First National Bank of Fond du Lac, $300, or to the indorsers, in case they paid the same; to Henry Kuicks, $150; Mrs. Murphy, $100; Thomas Weeks, $50; Burns Bros., $50; W. S. Russell, $50; and Hughes and Otis, $175. In case the money received should not be sufficient to pay such debts in full, the same was to be applied to them ratably, share and share alike. Out of the proceeds, if any remained, the trustee was to pay the wife of *Edmund Blewett* the sum of $1,400 in payment for forty acres of land in Oakfield, belonging to her, and included in a mortgage to Mary Gaynor for his benefit, the balance of such judgment, if any, to be paid to said *Blewett*.

On the same day *Edward S. Bragg*, by an indorsement

thereon, accepted such trust, and agreed to discharge the same to the best of his ability.

This creditors' suit was commenced in December, 1890, against James G. Gaynor, Patrick Gaynor, *Edmund Blewett*, and others, and the summons and complaint were duly served on the defendant *Edmund Blewett*, who appeared in the action, but made no answer nor defense, and suffered default. Due service of the summons was made on the other defendants. At the time of the rendition of said judgment Patrick Gaynor was merely a nominal party thereto, and had no interest therein, nor in the moneys secured thereby, but the same was the sole property of *Edmund Blewett*, who had good right to convey, satisfy, or assign the same. Patrick Gaynor had no authority to satisfy said judgment in whole or in part, as he did November 10, 1890. He received no compensation or consideration for any such discharge or satisfaction, and the same was without authority, and colorable merely, to hinder and delay the collection of said judgment in the interests of James Gaynor, with whom he was in fraudulent collusion. No partnership ever existed between *Edmund Blewett* and Patrick Gaynor, as alleged in Patrick Gaynor's answer, nor in any manner whatever. Said judgment was never a partnership asset or partnership property. Patrick Gaynor has had no interest therein, and no claim, demand, or right to the same, or to any part thereof, or to an account therefor, or for any part thereof.

At the time of the commencement of this action there was justly due to the plaintiff, *Edward S. Bragg*, for his professional services for and on behalf of *Edmund Blewett* in and about the suits mentioned, $2,500, and to the defendant Thomas W. Spence for like services in such suits, $1,200.

As conclusions of law the court, among other things, found that the assignment by *Edmund Blewett*, mentioned, passed the title to said judgment and the moneys due thereon, together with the right to bring suit and take all the neces-

sary remedies required to enforce and collect the same in his own name, to the plaintiff, *Edward S. Bragg*, as trustee of an express trust, free and clear of all and every claim thereon, except as specified in such assignment; that Patrick Gaynor had no right to satisfy said judgment, or any part thereof, and the same was fraudulent and void, and of no effect or validity whatever; that the plaintiff was entitled to a receiver according to the prayer of his complaint, who was therein required to execute and file a bond in the penal sum of $20,000, conditioned according to law, with three sureties to be approved by the judge; that such receiver should have and exercise all the powers of a receiver in a court of equity, and especially the powers and duties conferred upon him by the judgment in this action.

Upon such and other findings a judgment was entered in favor of the plaintiff and against the defendants, in which it was, among other things, adjudged and decreed that Gaines A. Knapp, of Fond du Lac, be, and he was thereby, appointed a receiver of all the property, debts, credits, and effects of the said James Gaynor, and charged to carry out and execute the decree; and the receiver so appointed gave the requisite bond, and qualified, and entered upon the duties of his office. From such judgment the defendants Patrick Gaynor, Helmer, and Chapman appealed to this court, and such judgment was in all things affirmed by this court. *Bragg v. Gaynor*, 85 Wis. 468–492.

The receiver so qualified August 12, 1892. April 17, 1895, the defendant James Gaynor and the plaintiff, *Edward S. Bragg*, entered into an agreement and stipulation to the effect that, the subject matter of the action having been amicably adjusted between the parties in interest thereto, it was thereby stipulated by and between them that Gaines A. Knapp be discharged from all further relation to the action and to the decree therein, without claim or liability on their part, either individually or jointly, against him, by

reason of any act done or moneys received by him as such receiver, and thereby gave their consent and promise that the bond given by him as such receiver, and also the bond given by him as receiver in the action of Knapp against Helmer et al., to collect rents and care for the property, be discharged and surrendered without any liability or claim thereon; and they thereby requested the court to enter the order to carry into effect such agreement between them. On the petition of *Edmund Blewett* the trial court, October 29, 1896, ordered such receiver to report to the court.

On November 30, 1896, he made his detailed and verified report, to the effect that he had made sundry collections; that he had caused two suits for foreclosure to be commenced against Helmer, together with a large number of other defendants having or claiming to have liens, claims, or incumbrances on the mortgaged premises, which were necessary to be adjudicated and determined, so that a sale could be had of the mortgaged premises free and clear of incumbrances; that both of such actions were transferred from the Fond du Lac circuit court to the United States circuit court upon petition of nonresident defendants, August 30, 1893; that the receiver employed counsel to conduct such foreclosure proceedings to enforce such judgment, in which he was commissioned and empowered to bring such foreclosure proceedings; that February 9, 1894, by the judgment of the United States circuit court, said causes were remanded to the circuit court for Fond du Lac county; that March 6, 1894, judgment was rendered in the circuit court for Fond du Lac county in favor of the receiver, as plaintiff, and against Helmer and other defendants, as follows: In one of the cases, for principal, interest, solicitor's fees, and taxed costs, $8,889.33; in the other case, for principal, interest, solicitor's fees, and taxed costs, $3,293.22; that March 7, 1895, he caused the property to be noticed for sale April 18, 1895, upon each of such foreclosure judgments; that the time fixed for such sale

was the next day after such settlement between the plaintiff and James Gaynor; that there was paid to him on account of the mortgage of Chapman charged in the decree, moneys to the amount of $3,426, which was the whole amount charged with the payment of plaintiff's judgment in this action; and that he gave receipts therefor, and executed and delivered satisfaction *pro tanto* of the Chapman mortgage; that he disposed of and paid out the moneys so received as follows: To the plaintiff, *Edward S. Bragg*, in the aggregate, $3,257.54; that he retained to apply on costs of executing judgment, $142.72; that in pursuance of the adjustment and settlement between James Gaynor and the plaintiff, *Edward S. Bragg*, he had given receipts, releases, etc., and paid over moneys and made transfers to carry out and complete such settlement.

On December 16, 1896, an order was entered by the court in this action, wherein and whereby it was ordered and adjudged that the report of the receiver be, and the same was thereby, ratified and approved by the court, and the bond filed by him be, and the same was thereby, satisfied and discharged, and that the receiver and his sureties be discharged from all and every liability thereon, and that said Knapp be, and he was thereby, discharged of and from all liability by reason of any act of his in performance of his duty as such receiver. December 16, 1896, an order was entered by the court in the action of said Knapp, receiver, against Helmer and others, wherein and whereby it was ordered and adjudged that the bond given by the receiver in that action be, and the same was thereby, discharged, and the said Knapp was thereby discharged of and from all liability on such bond, or by reason thereof, and of and from all liability by reason of any act done under and by virtue of the appointment of him as such receiver.

Thereupon the defendant *Edmund Blewett*, by a notice entitled in this action, appealed from each of said orders so

entered December 16, 1896, and from the whole and every part of each of said orders.

We are not aware of any adjudication in this or any other court authorizing the defendant *Edmund Blewett* to appeal from the order approving the receiver's report in this case, and discharging him, and in and by the same notice also appeal from an order made in another action between entirely different parties, and to which he is not a party. Such a practice cannot be tolerated. The appeal from the order in the case of Knapp, receiver, against Helmer et al. must be dismissed. As indicated, the defendant *Edmund Blewett* was the sole owner of the judgment which was the basis of this action, and he assigned all his right, title, and interest therein to the plaintiff, *Edward S. Bragg*, in trust for the uses and purposes therein mentioned, before this creditors' suit was commenced. Although he was a defendant in this suit, and appeared therein, yet he made no answer, and suffered judgment by default. April 17, 1895, this suit was settled by the plaintiff and the only defendant having any interest. The receiver carried such settlement into effect, and the trial court confirmed and approved the same. The defendant *Edmund Blewett* is in no position to call the receiver to account in this action, nor to appeal from the order approving his report. The receiver was bound to carry into effect the judgment by which he was appointed. There is nothing in that judgment requiring him to pay anything to *Edmund Blewett*. If the plaintiff has failed to execute the trust imposed in him by the assignment to him by *Edmund Blewett*, then his remedy is against the plaintiff in some appropriate action or proceeding; but he is not aggrieved by reason of the receiver having paid money into the hands of the trustee appointed by himself. It is well settled in this state that an appeal cannot be taken by a party who is not "aggrieved." R. S. 1878, sec. 3048; *McGregor v. Pearson*, 51 Wis. 122; *Eureka Steam Heating*

Co. v. Sloteman, 67 Wis. 126; *Shabanaw v. C. C. Thompson & Walkup Co.* 80 Wis. 621; *Day v. Buckingham*, 87 Wis. 219.

By the Court.—The appeal from both orders of the circuit court is dismissed.

---

99 356
106 83
99 356
107 120
107 121

THE H. B. CLAFLIN COMPANY, Respondent, vs. GRASHORN, Appellant.

March 28—April 12, 1898.

Fraudulent conveyance: Participation by grantee.

1. In order to render a chattel mortgage of a stock of goods, given to secure a pre-existing *bona fide* debt, voidable as being fraudulent as to other creditors, the mortgagee must have actually participated in the fraudulent intent. So long as his purpose was simply to secure his own debt, his knowledge of the fraudulent purpose of the mortgagor will not affect the security.
2. It is no evidence of fraud that the notes secured by the mortgage are guaranteed by a third party. The holder has the same right to take other security as if they were not guaranteed.

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Affirmed.*

This is an action of replevin to recover a stock of dry goods. The stock was originally owned by Brown & Frost as copartners, and they gave a chattel mortgage thereon to the plaintiff December 17, 1895, to secure their notes, amounting to more than $23,000. Immediate possession was taken under the mortgage, and on the following day one Otten, who was a creditor of Brown & Frost to the amount of nearly $4,000, commenced his action, and sued out a writ of attachment, upon which the defendant, as sheriff, seized the said stock of goods; and the sheriff justifies such seizure on the ground that the chattel mortgage was given with intent to hinder, delay, and defraud the creditors of Brown &

Frost. At the close of the evidence a verdict for the plaintiff was directed, and from judgment thereon the defendant appeals.

Paul T. Krez, for the appellant, to the point that a transfer of goods, though for a full and valuable consideration, made for the purpose of defeating the claims of creditors and without the knowledge and assistance of the transferee, is fraudulent as to those creditors, cited *Robinson v. Holt*, 75 Am. Dec. 233; *Beidler v. Crane*, 25 Am. St. Rep. 349; *Beels v. Flynn*, 26 id. 351; *Renninger v. Spatz*, 15 id. 692. Taking additional security is also a sign of fraud. *Crapster v. Williams*, 21 Kan. 109.

Willard C. Cole, for the respondent.

WINSLOW, J. The verdict in this case was rightly directed. It is not denied that Brown & Frost justly owed the plaintiff the entire amount named in the mortgage, when the mortgage was given and possession of the stock taken. It was a mortgage given to secure a pre-existing *bona fide* indebtedness. In such a case there must be actual participation by the creditor in the fraudulent purpose of his debtor, in order to avoid the mortgage. Mere knowledge by the creditor of his debtor's fraudulent purpose will not be sufficient, so long as the creditor's purpose is simply to secure his debt. *Bleiler v. Moore*, 94 Wis. 385. We have examined the evidence, and have found nothing tending to show participation by the plaintiff in any intended fraud, even if it be conceded that fraud was intended by the firm of Brown & Frost. It seems to have acted with the simple purpose of securing its just debt. The fact that the notes held by it were guaranteed by a third party is certainly no evidence of fraud. It had the same right to take security from the principal debtors which it would have had in the absence of such guaranty.

By the Court.—Judgment affirmed.

ROSENOW and another, Respondents, vs. GARDNER, Appellant.

March 28—April 12, 1898.

Res adjudicata: *Certificate on appeal.*

Plaintiffs began an action to recover a board bill while having in their possession some personal effects of the defendant, upon which they were entitled to a lien for such bill. Defendant replevied such effects. Plaintiffs recovered judgment in the replevin case by virtue of their lien. Such judgment was subsequently pleaded, in the action to recover the amount of the board bill, as a bar to further prosecution of that action. Plaintiffs recovered judgment nevertheless. The trial court then certified that whether the judgment in the replevin case was a bar to the prosecution of the first action was a legal question of such doubt and difficulty as to require the decision of the supreme court. *Held*, that the rule of the conclusiveness of a former adjudication has no application to the facts as against the plaintiffs. No question was decided in the first case that affected the right of plaintiffs to recover the board bill. And, further, that in making a certificate to enable a party to appeal to this court from a judgment of less than $100 exclusive of costs, the law contemplates that the trial judge shall act judicially and with some degree of discretion, and not in a mere perfunctory way to sign a certificate to enable a party to appeal where no disputable question of law is involved. [Syllabus by MARSHALL, J.]

APPEAL from a judgment of the county court of Fond du Lac county: A. E. RICHTER, Judge. *Affirmed.*

The amount involved being under $100, the case comes to this court on a certificate of the trial judge. The facts certified are that plaintiffs commenced an action against the defendant in justice's court, to recover the amount due on a board bill incurred at plaintiffs' hotel. Defendant appeared in the action and answered. Subsequently defendant commenced an action of replevin against plaintiffs to recover possession of certain personal property held by them under a claim of lien to secure the board bill. Plaintiffs appeared in that action and recovered on their lien claim, the

court holding that they were entitled to the possession of the property by virtue of such lien. Judgment was entered accordingly. Thereafter plaintiffs proceeded to judgment against the defendant, for the board bill, in justice's court. Defendant appealed from such judgment to the county court, and there amended his answer, setting up the judgment in the replevin case as a bar to further proceedings in the action to recover the amount due on the board bill. Judgment was rendered for the plaintiffs. The question of law for decision, as stated by the trial court, is, Does the judgment in the replevin case constitute a bar to plaintiffs' proceeding in this action to recover the amount due on the board bill? The defendant appealed.

The cause was submitted for the appellant on the brief of *E. Blewett*, and for the respondents on that of *Giffin & Sutherland.*

Counsel for the appellant contended, among other things, that the finding of the amount due the defendants and judgment therefor in the replevin action was a bar to the action for the debt. Black, Judgments, §§ 504, 671; *Emmons v. Dowe*, 2 Wis. 356; *Pierce v. Kneeland*, 9 id. 23; *Kalisch v. Kalisch*, id. 529; *Ellis v. N. P. R. Co.* 80 id. 459; *Mo. Pac. R. Co. v. Levy*, 17 Mo. App. 501. A return of the property under a judgment in replevin is a satisfaction of the judgment. *Morrison v. Austin*, 14 Wis. 604, 605; *Irvin v. Smith*, 66 id. 113.

MARSHALL, J. The question of law submitted, we decide and answer in the negative. The rule that a judgment in an action in a court of competent jurisdiction, as to the case involved, is conclusive between the parties to it in that and all courts, as to all questions that were or might have been litigated and decided, where they subsequently arise on the same cause of action, and is conclusive respecting all questions actually litigated and decided when they subsequently

arise in another cause of action between the same parties, is what the appellant invokes, and cites fifty-three authorities to support, but wherein it applies to the facts of this case, certified to by the trial court, is not pointed out nor is it discoverable. The questions in this case involved only the right to recover for the board bill, and the amount of it. Such questions were not decided adversely to plaintiffs in the replevin case, but in their favor, though the recovery of the debt could not be had in the tort action. Instead of the judgment being a bar to plaintiffs' proceeding to recover in this action, it determined the facts requisite to such recovery in their favor.

The question submitted is too simple to require discussion. We can but assume that the trial court made the certificate, upon which the appeal is based, without that attention and regard for the nature of the proceeding which the law contemplates shall be bestowed on the subject. The legislative intent, voiced by the statute, clearly is that, in stating questions of law for decision in such cases, the trial judge shall exercise sound judgment, and not sign a certificate, certifying that a doubtful question of law exists, requiring a submission of it to the supreme court, and thereby start a case on its way to this court, when only the plainest principles of law are involved, not open to serious controversy among professional men. To do that falls short of judicial duty under, and defeats, the law wisely enacted to prevent appeals in cases involving trifling amounts, and no disputable questions of law.

By the Court.—The question of law certified is answered in the negative, and the judgment is accordingly affirmed.

99 361
98 642
99 197
99 388
99 361
103 330
99 361
108 262
99 361
112 59
99 361
113 336

McFarlane, Appellant, vs. The Town of Sullivan, Respondent.

January 18 — May 3, 1898.

Defective highway: Proximate cause.

In an action against a town for an injury alleged to have been caused by a defect in the highway, it appeared that the plaintiff when driving a horse on a dark night struck the horse and drew up on the lines, and the horse starting quickly one of the lines broke, and as he pulled the other line the horse veered and the cart wheel hit a stone in the highway and he was thrown out and injured. *Held*, that the proximate cause of the injury was not the stone, but the breaking of the line and the pulling on the other line which caused the horse to veer out of her course.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

The facts of the case appear in the opinion.

For the appellant there was a brief by *Rogers & Rogers*, and oral argument by *W. H. Rogers.*

Harlow Pease, for the respondent.

The following opinion was filed February 8, 1898:

CASSODAY, C. J. This action was brought to recover damages sustained by reason of an alleged defective highway. The answer consists of admissions and denials, and alleged contributory negligence. At the close of the trial the court directed a verdict in favor of the defendant upon the ground that the alleged defect in the highway was not the proximate cause of the injury. From the judgment entered thereon the plaintiff brings this appeal.

It appears from the plaintiff's testimony, in effect, that at the time of the accident the plaintiff was twenty-four years of age, and lived with his father on a farm about two and a half miles south of the village of Rome; that some time

after dark on the evening of April 25, 1895, the plaintiff started from his home to go to Rome, with a gentle mare, between five and six years old, hitched to a two-wheeled cart; that it was so dark that, as he passed his sister and two ladies within two feet of them, he did not recognize them until one of them spoke; that the mare trotted along at her natural gait, until she came to the top of the hill; that he then let her walk down the hill towards the north, because it was rough; that, after he supposed he had passed the rough ground, he spoke to the mare, but, as she did not start to trot, he tightened on his lines with his left hand, and touched the mare with his whip, and she started up quick; that he then pulled on the lines with his left hand, and then the right line came apart, and that, before he had time to speak to the mare to stop her, the left wheel of his cart struck a large stone near the traveled track, and he was thrown out upon his head and shoulders and badly injured; that he held on to the mare until she stepped over the right-hand thill, and broke it, and came near stepping on him, when he let loose of the mare, and she went off with the cart; that he struck the mare just once, and she started quick,—suddenly; that, having both lines in his left hand, he pulled up with that hand, and the right line broke clear in two; that he had the piece that was left in his hand until the mare came near stepping on him, when he let go of it; that when the right line broke, and he pulled, and the pressure came upon the left line, the mare veered to the left, and soon after that his cart struck the stone; that he had known of the stone being there since 1892, but supposed he had got by it,—judging from the distance,—as it was too dark to see it; that the mare made but one jump; that the line broke when she started; that after the line broke the wheel struck the stone before he could say "Whoa!" that if he had said "Whoa!" it would not have done any good,—it would not have stopped the mare in

that short distance; that the wheel would not have hit the stone if his line had not broken.

It appears that the stone was three feet across one way and three and one-half the other way, and from sixteen inches to about two feet above the ground, and from six to ten inches from the wheel track; that there was about twenty-six feet clear space of traveled track opposite the stone. The plaintiff was alone at the time of the accident, and the statement made as to the manner of its occurrence is taken directly from his testimony.

We shall assume, for the purposes of this appeal, as the trial court manifestly did, that whether the stone was so near the traveled track as to constitute a defect, within the meaning of the statute, was a question of fact for the jury. We shall also assume that whether the plaintiff was guilty of contributory negligence in striking the mare with the whip, as he did, under the circumstances, was a question of fact for the jury.

The right of action is purely statutory. To recover, it must be made to appear that the damage happened "by reason of the insufficiency or want of repair" of the highway. Sec. 1339, R. S. 1878. No one claims that this statute creates an absolute liability in every case where such defect contributes to the injury. To be liable, the defect must be the cause of the injury; that is, the proximate cause of the injury. *Flagg v. Hudson*, 142 Mass. 288; *Cohen v. New York*, 113 N. Y. 537; *Jackson v. Bellevieu*, 30 Wis. 250; *Roberts v. Wis. Tel. Co.* 77 Wis. 592; *Bishop v. Belle City St. R. Co.* 92 Wis. 143; *Salzer v. Milwaukee*, 97 Wis. 471.

This court, following *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 474, 475, and former decisions of this court, said in *Atkinson v. Goodrich Transp. Co.* 60 Wis. 156: "The primary cause may be the proximate cause of the disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force ap-

plied at the other end, that force being the proximate cause of the movement; or as in the oft-cited case of the squib thrown in the market place. 2 W. Bl. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." These cases are sanctioned, and the rule enlarged upon, and numerous cases cited, by Mr. Justice PINNEY in the recent case of *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348. The same is true in a still more recent case in an opinion by Mr. Justice MARSHALL (*Deisenrieter v. Kraus-Merkel Malting Co.* 97 Wis. 279), where the cases are collated. Mr. Cooley says: "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. . . . To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile." Cooley, Torts (2d ed.), 73.

In the case at bar it is obvious that the primary cause of the injury, and which led by regular sequence to it, was the breaking of the line. After that line broke, the plaintiff, according to his own testimony, pulled on the left line, and the mare veered to the left, and soon after his cart struck the stone, and he was injured; and if the line had not

broken, the wheel would not have hit the stone. As stated by the trial court, in consequence of the breaking of the line, the plaintiff, by pulling upon the left line, drew the mare or cart onto the stone. The line which was not broken, instead of being an agency for keeping the mare within the traveled track, was a potent agency for taking her outside of the traveled track. The town was in no way responsible for the breaking of the line, and the plaintiff testifies that, if it had not broken, the injury would not have happened. The instant the line broke, the mare ceased to be under the control of the plaintiff; and the broken line precluded the plaintiff from regaining such control. The shortness of the distance between the place where the line broke and the stone does not change the principle. The mare had passed entirely out from under and beyond the plaintiff's control, as much so as in *Jackson v. Bellevieu*, 30 Wis. 250. Thus, in a recent case in Massachusetts it is held that, "if a traveler on a highway in a city loses complete control of the horse which he is driving, and such loss of control is not momentary only, but is a permanent condition, and he is injured, he cannot maintain an action against the city for his injury, although the way is defective." *Scannal v. Cambridge*, 163 Mass. 91. This is not the case of a momentary loss of control which would have been instantly regained if the plaintiff's cart had not come in contact with the defect. *Babson v. Rockport*, 101 Mass. 93; *Houfe v. Fulton*, 29 Wis. 306; *Schillinger v. Verona*, 85 Wis. 599; *Bishop v. Belle City St. R. Co.* 92 Wis. 143. In Massachusetts and Maine it is held, in effect, that the liability of towns is a limited one, and, to enable the plaintiff to recover, it must be shown that the defect in the highway was the sole cause of the injury. *Murdock v. Warwick*, 4 Gray, 178; *Marble v. Worcester*, 4 Gray, 395; *Rowell v. Lowell*, 7 Gray, 100; *Bemis v. Arlington*, 114 Mass. 509; *Moulton v. Sanford*, 51 Me. 127.

This court, in some early cases, professed to follow the Massachusetts cases; but it is manifest that they failed to do so in the particular here mentioned. But the furthermost this court has ever gone in the opposite direction has been to hold that, "if the accident happened partly from a cause in respect to which a want of ordinary care could not be imputed to the traveler, as from a defect in the axle of a vehicle he was driving, the town is liable if the accident would not have occurred but for the highway being out of repair." *Dreher v. Fitchburg*, 22 Wis. 675. That is to say, where the defect in the highway concurred with the defect in the vehicle, the plaintiff was not thereby necessarily barred from a recovery. So in *Houfe v. Fulton*, 29 Wis. 296, the defect in the highway was, in effect, held to be the proximate cause of the injury, and the right to recover was not defeated merely because there was "another proximate cause," not attributable to the plaintiff, nor to any third person, contributing directly to produce the injury,—that is to say, the plaintiff was not precluded from recovery merely because there were two proximate concurring causes to produce the injury, neither of which was the fault of the plaintiff, nor that of a third person. These cases certainly should not be extended, since they are departures from the rule maintained in the state from which we borrowed our statute. Neither of those cases, however, goes to the extent of holding that the defendant may be held liable in a case like the one at bar, which is clearly distinguishable. In this case, as indicated, the alleged defect in the highway was not a proximate nor a concurring cause, but a subsequent and remote cause.

By the Court.—The judgment of the circuit court is affirmed.

WINSLOW and PINNEY, JJ., dissent. BARDEEN, J., took no part.

Upon a motion for a rehearing the following opinion was filed May 3, 1898:

CASSODAY, C. J. As indicated in the brief of counsel for the plaintiff, on their motion for a rehearing, this case was determined when there was a vacancy upon the bench, and by an equally divided court. The facts, however, are undisputed and very simple. Whatever difference of opinion there may be as to the application of the law to the particular facts, yet the law on the subject is familiar to the bench and bar.

By the Court.—The motion for a rehearing is denied.

THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant, vs. FRICKE, Insurance Commissioner, Respondent.

February 14—May 3, 1898.

99 367
s102 107
102 110
102 112
f102 114
102 115
102 116
103 188
f103 217
103 219

99 367
41 LRA 557
57 LRA 72n
57 LRA 374n
57 LRA 728n

99 367
115 475

99 367
117 654

Foreign insurance companies: Revocation of licenses: Interest on fees: Equity: Statute of limitations: Estoppel.

1. Under the provisions of sec. 1955, R. S. 1878, the commissioner of insurance may revoke the existing license of any foreign insurance company to transact business in this state, for its failure or refusal to pay the lawful license fee for the license of a previous year. Such a failure or refusal is a continued failure to comply with the statute. CASSODAY, C. J., dissents.
2. The state is not estopped, by the failure of its officers to require compliance with the law at the proper time, from afterward insisting upon it; nor, the law being plain, can the doctrine of practical construction be applied to such action.
3. The license fee is not a tax, but a condition precedent to the plaintiff company's enjoying the privilege of doing business in this state, and by accepting such license and doing business under it the company bound itself to comply with the law.
4. Unpaid license fees bear legal interest from the various dates when they ought to have been paid.

5. A corporation standing confessedly in arrears to the state in large sums cannot invoke the aid of equity to restrain the commissioner from an effort to enforce the law.
6. The plaintiff being a foreign corporation all of the time and having its residence in another state, the statute of limitations does not apply in its favor; nor is it applicable in an action in equity to prevent the insurance commissioner revoking its license.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action in equity, brought to enjoin the defendant, who is the insurance commissioner of the state of Wisconsin, from revoking a license issued by said commissioner to the plaintiff March 1, 1896. The facts in the case are not materially in dispute, and are as follows: Since the enactment of the Revised Statutes of 1878, up to the time of the commencement of this action, the plaintiff has done both a life and accident insurance business within this state, under licenses issued annually by the various insurance commissioners. During that time the plaintiff has paid, as a license fee for each year, only the sum of $300 up to the year 1895, since which time it has also paid two per cent. upon its gross accident business within the state, pursuant to the decision of this court in a previous case between the same parties, reported in 94 Wis. 258. In December, 1896, the insurance commissioner demanded of the plaintiff, in substance, that it should pay an additional $300 license fee for the transaction of its accident business for each year since 1880; also the two per cent. tax for each year since 1880, with legal interest on said sums from the 1st of March in each year, and threatened to revoke the license issued March 1, 1896, in default of such payment. The total amount of the sum so demanded, with interest, is $35,297.74. The plaintiff declined to pay this sum, and immediately brought this action in equity to enjoin the commissioner from revoking its license. The circuit court held, upon these facts, that the insurance

commissioner was authorized to revoke its license, and dismissed the complaint, and from this judgment the plaintiff appeals.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas* and *F. C. Winkler*. Among other things, they argued that the license fee is a tax, and, in the absence of any provision for the collection of it by action, no action would lie. *Mühlenbrink v. Long Branch Comm'rs*, 42 N. J. Law, 364; *License Tax Cases*, 5 Wall. 462, 474; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 693; *Adams Exp. Co. v. Owensboro*, 85 Ky. 265; *Comm. v. Stodder*, 2 Cush. 562, 572–3; *In re Wan Yin*, 22 Fed. Rep. 701; Cooley, Const. Lim. (6th ed.), 242, 243, 611. A tax can be collected only at the time and in the manner provided by statute. The fee for a license is to be collected before that is issued. No right of action therefor is given to the state. *Lane Co. v. Oregon*, 7 Wall. 71, 80; *Camden v. Allen*, 26 N. J. Law, 398; *Baldwin v. Hewitt*, 88 Ky. 673; *Louisville Water Co. v. Commonwealth*, 98 id. 244; *State v. B. & O. R. Co.* 41 W. Va. 81; *Monterey Co. v. Abbott*, 77 Cal. 541; *Packard v. Tisdale*, 50 Me. 376. License fees, being taxes and not debts, do not bear interest. *State v. S. W. R. Co.* 70 Ga. 11, 33; *W. U. Tel. Co. v. State*, 55 Tex. 314; *Shaw v. Peckett*, 26 Vt. 482; *State ex rel. Brennert v. Farrier*, 47 N. J. Law, 75; *Louisville & N. R. Co. v. Hopkins Co.* 87 Ky. 605; *Perry v. Washburn*, 20 Cal. 318, 350. The commissioner of insurance has no power to revise the action of his predecessor or to revoke a license granted by him. His power to revoke is limited to licenses granted by himself. *Comm. v. Pennsylvania Co.* 145 Pa. St. 266, 280; *Philadelphia v. Ridge Ave. R. Co.* 142 id. 484.

The *Attorney General* and *John L. Erdall*, first assistant attorney general, for the respondent, contended that, for the failure of a foreign insurance company to comply with any of the provisions of the law applicable thereto, the commis-

sioner was required by sec. 1955, R. S. 1878, to revoke its license, without any limitation as to the time of such failure. The requirement of a license fee is not a tax, but a condition of permission to do business, and the company, by accepting a license, undertook to pay it. *Horn Silver M. Co. v. New York*, 143 U. S. 305; *Hooper v. California*, 155 id. 648. An action in the nature of debt or *assumpsit* will lie. *Fire Department of Oshkosh v. Tuttle*, 50 Wis. 552; *Bath v. Freeport*, 5 Mass. 325; *Pawlet v. Sandgate*, 19 Vt. 621.

The following opinions were filed March 1, 1898:

WINSLOW, J. In the former action in equity brought by this same company, and reported in 94 Wis. 258, the question presented and decided was whether the insurance commissioner had power to revoke the license of the plaintiff to do an insurance business in this state on account of failure to pay the license fees required by law for the year for which the license was issued. In the present suit the question presented is whether the insurance commissioner has power to revoke the defendant's license for the current year, on account of its failure to pay the full license fees accruing for past years, during which it has done business in this state under license.

We have no intention of reviewing again the questions discussed and decided in the previous action. The statutes were then deliberately considered and construed, and the conclusions then reached are entirely satisfactory; and, so far as applicable, they will be applied to the present case. It was then held, in effect, that the annual license fees required to be paid by foreign insurance companies desiring to do business in this state were levied upon the *business* transacted, and not upon the company transacting the business; that ch. 105, Laws of 1880 (sec. 1953*a*, S. & B. Ann. Stats.), was an amendment simply to sec. 1220, R. S. 1878, and that it added to the fees previously required the pay-

ment of two per cent. upon the gross income received upon accident business during the preceding year; that the doctrine of practical construction had no application, because the statute was plain, and not doubtful; and that the commissioner had a right to revoke the license for the current year on account of failure to pay the two per cent. upon the previous year's business. The question of the power of the commissioner to revoke the current license on account of past defaults in payment of license fees was expressly reserved for future consideration, and that is the question now to be decided. When it was held that the license fees were fees levied upon the business, and not upon the company transacting the business, it necessarily followed, under the provisions of sec. 1220, R. S. 1878, that a foreign company which transacted both life and accident business in this state was required to pay two fees of $300 each, and, in addition, was required to pay two per cent. upon its previous year's income arising from the accident business. The plaintiff company has been such a company ever since the enactment of the Revised Statutes, and it has paid but one fee of $300 during each year, although doing both kinds of business; and hence it has failed to comply with the law in this respect, as well as in omitting to pay the two per cent. additional required by ch. 105, Laws of 1880.

The default of the plaintiff company being established, the vital question for consideration is as to the power of the commissioner to revoke an existing license on account of such default. It is not, and cannot now be, denied that the plaintiff company could only transact business in this state by permission of the state, and under such conditions as the state might impose. This principle has been laid down again and again in no uncertain terms. RYAN, C. J., in *State ex rel. Drake v. Doyle*, 40 Wis. 175, says: "Save by voluntary license of the state, the insurance company has no right to carry on its business within the state. . . . Authorizing such

license, out of its mere discretion it was competent for the legislature to impose any conditions, reasonable or unreasonable, and to provide for revocation, upon any cause or no cause, in any manner it might see fit." See, also, *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 136; *Lewis v. Am. S. & L. Asso.* 98 Wis. 203.

These propositions being impregnable, we may at once proceed to consider what power of revocation the legislature has given to the commissioner of insurance. Sec. 1955, R. S. 1878, provides as follows: "If any such corporation [referring to foreign insurance corporations] shall violate or fail to comply with any provision of law applicable thereto, or in case its capital shall be impaired and shall not be made good within such time as the commissioner of insurance shall require, according to section 1968, it shall be the imperative duty of said commissioner to revoke any and every authority, license or certificate granted to such corporation, or any agent thereof, to transact business in this state," etc. It is argued that the power here granted to the commissioner is "not a power of revision of the past, but of provision for the future;" that the language is prospective, and not retrospective; and that, for defaults occurring during the existence of previous annual licenses, there can be no revocation of an existing license the fees for which have been fully paid. Carried to its legitimate result, this argument would produce this result: that, when a license was once issued by the commissioner, all past matters, even in connection with the issuance of the license itself, would become a sealed book. It might have been obtained without compliance with the necessary conditions, and yet it could not be revoked, because the power of revocation is only given to be exercised upon violations occurring after the issuance of the license. We do not say that this was the argument made by the appellant, but that such is the ultimate effect of the argument.

It is manifest, of course, that such could not have been

the intent of the legislature; and it was substantially admitted on the argument that, in case of the failure to comply with any of the conditions which are a prerequisite to the issuance of a given license, that license might be revoked; but it was argued that this was the extent of the power of revocation, and that for the defaults occurring during the existence of previous licenses there could be no revocation. Certainly, this position seems reasonable, as applied to defaults which might be called "temporary," as distinguished from "continuing" defaults. For instance, in case the company had failed during some previous year to file a copy of its charter or appoint its resident attorney, but had supplied the omission before the issuance of the current license, it would seem that there could scarcely be a revocation of the existing license on account of such default. But can such an argument be applied to a failure to pay the lawful license fee? Is not this a continuing failure to comply with the law, and just as much a present failure as it was during the year when it occurred? Certainly, it was a legal duty then to pay the required fee. Did the duty cease at the end of the year? Has the lapse of time made it any the less a duty? Has the offense been condoned by the issuance of new licenses, decorated with gilt seals? So long as the fee *remains* unpaid, is it not a present failure to comply with the law, just as much as it was in the year when it occurred? We are unable by any chain of logical reasoning to say that this failure to comply with the law is a failure which is past and closed, and that it is not an existing failure as well. If it be a present existing failure, then the present existing license may be revoked because of such failure, under the strictest construction that can be given to the law.

It avails nothing to say that this license fee is essentially a tax, and that no action lies to recover a tax unless it be given by express statutory enactment. Concede for the moment that this be so, the failure to pay the lawful license

was none the less a failure to comply with the provisions of the law when it occurred, and none the less a continuing failure up to the present time. Is it a hardship? No more a hardship now than it would have been if the annual amounts had been paid at the times required by the law. If a hardship at all, it is a hardship imposed by the law itself, and the legislature had full power to impose the hardship, if such in fact it be. But, whatever the rule be in other jurisdictions, it is not a tax under the decisions of this court. It was distinctly held by this court more than thirty years ago that substantially such a requirement as the one before us was not an exercise of the power of taxation. In *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 136, this court had before it a law requiring the agents of foreign insurance companies to pay to the fire department of the city of Milwaukee annually two per cent. of the premiums collected by them in such business, and the law was attacked as an unconstitutional exercise of the taxing power, in that it violated the rule of uniformity in taxation. In passing upon this contention, it was said that this requirement was not an exercise of the power of taxation, "but only a proper exercise of the police power inherent in the sovereignty of the state." The same general principle was afterwards approved and applied to laws requiring the payment of dog licenses and licenses for the sale of liquors (*Tenney v. Lenz*, 16 Wis. 566; *State ex rel. Henshall v. Ludington*, 33 Wis. 107); and it must be considered as the settled law of this state.

The principle is not infringed upon by the decisions holding that the license fees required of railroad companies for operating their roads and cars within this state are, in substance, taxes. These license fees are imposed upon an inherently lawful business, in lieu of taxes, the property of the company being entirely exempted from ordinary taxation, and are necessarily construed to be in the nature of taxation, and not as an exercise of police power; but in none

of these cases are the principles laid down in *Fire Department of Milwaukee v. Helfenstein, supra*, in any respect overruled. Being a mere condition imposed as the price of a privilege which might be refused entirely, it logically follows that, when the privilege is requested, obtained, and used, the corporation obtaining the privilege impliedly agrees to the conditions which go with it and upon which alone it can be obtained. *Fire Department of Oshkosh v. Tuttle*, 48 Wis. 91; *S. C.* 50 Wis. 552.

By accepting the license and doing business under it, the company undoubtedly bound itself to comply with the law governing the issuance of the license. *Lewis v. Am. S. & L. Asso.* 98 Wis. 203. Nor, upon familiar principles, is the state estopped from now insisting upon the condition on account of the failure of its officers to require compliance with the law at the proper time. The law was plain, and, as before stated, there was no room for the application of the doctrine of practical construction. Nor does the statute of limitations apply, for two reasons: (1) The plaintiff was a foreign corporation all of the time, and had its residence in another state. *Larson v. Aultman & Taylor Co.* 86 Wis. 281. (2) This is not an action to collect the unpaid fees, but simply an action in equity, to prevent the commissioner from revoking the license.

We perceive no error in adjudging that the unpaid license fees bear legal interest from the various dates upon which they ought by law to have been paid. The plaintiff has not only had all the benefit of its license, but has also had the use of the license moneys during all the time, and presumably has obtained legal interest thereon. During that time, also, the state has been deprived of the use of the money which it was entitled to have in its treasury. If, as held in this opinion, there was an implied agreement by the company when it obtained a license and did business thereunder, that it would perform all the requirements of the law, in-

cluding the payment of the fees required at the proper time, no reason appears why the unpaid fees should not bear interest.

In connection with the entire matter, it should be remembered that this is an action in *equity*, and not a mere action at law. Even supposing that the propositions here decided were doubtful, it would not necessarily follow that the plaintiff, standing confessedly in arrears to the state in sums aggregating many thousands of dollars, could invoke the aid of equity to stay the hand of the commissioner in an apparent effort to carry out the plain will of the law-making power.

The judgment of the circuit court was, in our opinion, right.

By the Court.—Judgment affirmed.

CASSODAY, C. J. All agree that during the years in question the state had the absolute power to exclude foreign insurance companies from doing any business in this state, and that such plenary power included the authority to prescribe the conditions upon which such companies might be allowed to do business within the state. Of course, each company was at liberty to accept or reject such conditions. Without attempting any argument or to give any reasons therefor, I am forced to dissent from the conclusions reached by my brethren, on the ground that the statute which makes it the imperative duty of the commissioner to revoke any license granted to such corporation for any violation or failure "to comply with any provision of law *applicable* thereto" (S. & B. Ann. Stats. sec. 1955), is not, in my judgment, broad enough to cover and include failures to pay license fees which might properly have been exacted by the commissioner for licenses which expired before the license here sought to be revoked was issued, but which was never before exacted. By granting such expired license without exacting the full amount which might have been exacted

for the same, and then, after the expiration of such license, to exact and enforce payment of the balance, would, necessarily, deprive the company of the legal right which it clearly possessed, of rejecting the conditions which are for the first time exacted. In other words, by paying all that was exacted for such expired license at the time it was granted, the state is in no position, after such license has expired, to claim an implied obligation to pay an additional sum, which the company had the legal right to reject had it been made when that license was issued, or at any time during the existence of such license. These views have some support in the construction which this court has heretofore given to this and other sections of the statute applicable. *State v. U. S. Mut. Acc. Asso.* 69 Wis. 76.

True, such exaction was not a tax, within the meaning of the provision of our state constitution which requires the rule of taxation to be uniform. Nor was it a *direct* tax in any sense, since it was not imposed specifically upon any particular property, person, or corporation. *Pollock v. Farmers' L. & T. Co.* 157 U. S. 429; *S. C.* 158 U. S. 601. But it was, nevertheless, an indirect tax in the same sense that an impost, duty, or excise is a tax; and that they are species of taxes is elementary. 1 Story, Constitution, § 950; *State ex rel. Sanderson v. Mann*, 76 Wis. 475. In my judgment, such exaction which the state might have made, and which, if made, the company was at liberty to reject, but which was never, in fact, made and insisted upon, cannot properly be regarded as an obligation implied by law upon contract or otherwise, even if such obligation might be implied from the imposition of a direct tax. The company was only obliged to perform such conditions as it voluntarily accepted and agreed to perform; and the one now sought to be enforced is a condition which it expressly repudiated, and never agreed to perform.

Upon a motion for a rehearing the appellant argued that, prepayment of the fee being a condition to the issuing of a

license, no contract or promise to pay can be implied after it has been issued. The granting of each year's license is an independent transaction, and a failure to pay the license fee for one year cannot affect the license for a subsequent year. A foreign corporation which has acquired a domicile in this state for the purposes of litigation is not a nonresident in such sense as to suspend the operation of the statute of limitations against it. 6 Thompson, Corp. § 7841.

The motion was denied May 3, 1898.

The right of a foreign corporation to plead the statute of limitations is the subject of a note to *Winney v. Sandwich Mfg. Co.* (86 Iowa, 608), in 18 L. R. A. 524.—REP.

---

99 378
101 152
101 368

99 378
102 520
104 257

99 378
a106 465

99 378
107 222
108 262
108 264
108 265

99 378
e109 74
109 390

99 378
110 [1]345

99 378
112 [3] 59
112 [2] 65

SCHNEIDER, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

March 25 — May 3, 1898.

Railroads: Collision at highway crossing: Contributory negligence: Proximate cause: Excessive speed: Statutory liability.

1. For a person approaching a railroad crossing on a diagonal street, in a closed vehicle containing noisy articles, the rear of such vehicle being towards a coming train which he knew was about due, not to stop and look out for such train after he came nearer than eighty feet to the track, though at the point where he did stop he could not see it when more than forty rods away, while at a distance of sixty feet from the track he might have seen it when 159 rods away, is contributory negligence on the part of such person, which will prevent a recovery for an injury by collision at such crossing. *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, distinguished.
2. The liability of railroads, under ch. 467, Laws of 1891, for injuries to persons caused by trains running at excessive speed in cities, etc., is not absolute, but is liable to be defeated by the contributory negligence of the person injured.
3. To define "proximate cause" in a charge to the jury as "a moving cause, or an immediate or direct cause to the remote cause," is

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The facts in the case appear in the opinion.

For the appellant there were briefs by *Barbers & Beglinger*, attorneys, and *Geo. R. Peck* and *H. H. Field*, of counsel, and oral argument by *H. H. Field* and *Charles Barber*.

For the respondent there was a brief by *Eaton & Weed* and *Bouck & Hilton*, a separate brief by *Bouck & Hilton*, of counsel, and oral argument by *M. H. Eaton* and *Gabe Bouck*. They argued, *inter alia*, that negligence could not be conclusively established by a state of facts upon which fair-minded men may differ. *Duame v. C. & N. W. R. Co.* 72 Wis. 523; *Hooker v. C., M. & St. P. R. Co.* 76 id. 548; *Hill v. Fond du Lac*, 56 id. 246; *Kaples v. Orth*, 61 id. 533; *Ferguson v. W. C. R. Co.* 63 id. 152; *Siegel v. M. & N. R. Co.* 79 id. 405; *Langhoff v. M. & P. du C. R. Co.* 19 id. 497; *Valin v. M. & N. R. Co.* 82 id. 6; *Huntress v. B. & M. R. Co.* 66 N. H. 185. Whether the plaintiff stopped at a proper place to look for the train was a question for the jury. *Bower v. C., M. & St. P. R. Co.* 61 Wis. 457; *Piper v. C., M. & St. P. R. Co.* 77 id. 247; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Renwick v. N. Y. C. R. Co.* 36 N. Y. 132; *Moore v. C., St. P. & K. C. R. Co.* 102 Iowa, 595; *Smith v. B. & O. R. Co.* 158 Pa. St. 82; *McGill v. P. & W. R. Co.* 152 id. 331. Our statute (ch. 467, Laws of 1891) makes a railroad absolutely liable for damages caused by running trains at excessive speed in cities, etc. *McCall v. Chamberlain*, 13 Wis. 637; *Brown v. M. & P. du C. R. Co.* 21 id. 39; *Antisdel v. C. & N. W. R. Co.* 26 id. 145; *Ward v. Jefferson*, 24 id. 342. This construction is given to similar statutes in other states. *Comm. v. B. & L. R. Co.* 134 Mass. 211, 213; *McKimble v. B. & M. R. Co.* 139 id. 542–549; *Western & A. R. Co. v. Roberson*, 22 U. S. App. 187; *Laird v. R. R. Co.* 62 N. H. 254; *Rowell v. R. R. Co.* 57 id. 132; *Martin v. N. Y. & N. E. R. Co.* 62 Conn. 331; *Union P. R. Co. v.*

De Busk, 12 Colo. 294, 309; *Zeigler v. S. & N. A. R. Co.* 58 Ala. 599; *Hart v. W. R. Corp.* 13 Met. 99; *Rodemacher v. M. & St. P. R. Co.* 41 Iowa, 297; *Pratt v. A. & St. L. R. Co.* 42 Me. 579; *Thorpe v. R. & B. R. Co.* 27 Vt. 140; *R. R. Co. v. Acuff*, 92 Tenn. 26.

CASSODAY, C. J. This action is to recover damages sustained by the plaintiff, November 26, 1895, while driving a milk wagon on Ninth street, across the defendant's main track, about a mile and a quarter southwesterly from the defendant's depot in Oshkosh. Issue being joined and trial had, the jury returned a special verdict to the effect (1) that the defendant was guilty of negligence which was the proximate cause of the plaintiff's injury; (2) that the plaintiff was not guilty of negligence which contributed proximately to the injury; (3) that the plaintiff did stop and look northeasterly along the railroad track, and listen for a train, at the place on the street marked "C" on the plaintiff's map; (4) that the bell was not ringing as the train approached and passed over the Ninth street crossing; (5) that the whistle was not blown for the Sixth street crossing at or near the whistling post for that crossing; (6) that the whistle was not blown for the Ninth street crossing at or near the whistling post for that crossing; (7) that the train was running, at the time it approached the Ninth street crossing, at the rate of twenty-five miles per hour; (8) that the plaintiff's damages were assessed at $6,000. Upon such verdict the court ordered judgment in favor of the plaintiff for the amount stated. From the judgment entered thereon accordingly the defendant brings this appeal.

It appears from the evidence, and is, in effect, undisputed, that Ninth street is sixty feet wide, and runs east and west through Oshkosh; that the track of the defendant's main line, with a right of way sixty-six feet wide, runs in a southwesterly and northeasterly direction through the city, and

crosses Ninth street at a point about 350 feet west of Idaho street, making an acute angle of about thirty-four degrees between the southeast line of the railway and the north line of Ninth street; that on the southeast side of the railroad track, and on the north side of Ninth street, at the time of the accident, there were many houses, barns, buildings, and trees, with occasional vacant lots, and Idaho street; that the first street east of the place in question, intersecting Ninth street and running north, is Idaho street; that about 750 feet east of Idaho street, and parallel with it, is Dakota street, running north from Ninth street; that about 900 feet east from Dakota street, and parallel with it, is Ohio street; that about 700 feet north of Ninth street, and parallel with it, is Sixth street; that the railroad crosses that street about 1,250 feet northeasterly from the place in question; that a sewer had been built along the center of Ninth street a few months before the injury, and, when completed and covered, there was left a ridge of earth on the top, a few inches high, which had turned the travel by team on the north half of the street, where the plaintiff was driving as he approached the crossing; that this sewer terminated at a covered manhole, marked "B" on the map, ten feet from the east rail at the crossing; that point C, mentioned in the verdict, was pointed out to the plaintiff's witness Finch, a surveyor and civil engineer, by the plaintiff, June 1, 1897, the day before the commencement of the trial, and more than eighteen months after the injury, and is seventy-eight and one-half feet from the manhole mentioned, measured along the traveled course (that is to say, eighty-eight and one-half feet from the southeast rail at the crossing); that the traveled track of that street from point C to the crossing was substantially smooth and level at the time.

It further appeared that the plaintiff was a farmer at the time, twenty-six years of age, and lived five miles west of the city, and had been engaged in peddling milk in Oshkosh

for five years, and usually drove home westerly along Ninth street in a covered milk wagon drawn by a team of horses, one five years old, spirited, and afraid of the cars; that the other was older, but with similar disposition; that the wagon contained several milk cans, three kegs of beer, a stove, a raffling outfit, a wheel of fortune, and other articles which made more or less noise as the wagon passed along the frozen ground of the street; that it was an ordinary milk wagon (low wheels in front, and high wheels behind), for the delivery of goods in the city; that it could be turned short; that the box stood three and one-half to four feet from the ground; that the seat was about a foot high above the box, and three feet from the front end of the box; that there was a window in the door; that the glass did not extend from the top of the cover down to the bottom of the box; that the wagon was of wood frame, covered with canvas; that the canvas extended about three feet up from the box; that the plaintiff's head was about two inches from the top of the wagon; that there was a door on both sides and in front of the seat, and about eighteen or twenty inches wide, with glass at the top end of the door, fourteen by seventeen inches in size; that the plaintiff did not talk with Bartlett after leaving Idaho street; that he was familiar with these streets and this locality, and had been for about six years; that about half a mile east of the place in question the plaintiff and his companion, Bartlett, stopped at a saloon and drank some beer, and then started for the plaintiff's home; that when they reached Idaho street the plaintiff stopped his team, opened the door, looked north, and listened, to see if a train was coming, but neither saw nor heard any; that he then drove on west about 250 feet, to point C, mentioned in the verdict, ninety-eight feet southwest from the most westerly extremity of the red barn, immediately southeast of the defendant's right of way, which was the last building to intercept his view down the track towards the

northeast; that from that point he could see the whistling post, a distance of 725 feet northeast of the crossing; that at that point, C, the plaintiff, with Bartlett sitting on his left, looked northeast out of the door, and listened for an approaching train; that none was in sight, and he heard no signals; that he was then within forty feet from the railroad track, at right angles from it, and eighty-eight and one-half feet, along the course he traveled, to the southeast rail of the track; that when he reached the southeast line of the defendant's right of way, which was sixty-two and one-half feet from the nearest rail, he could have seen down the track to the northeast, had he looked, for 2,295 feet, but that he did not look, and did not hear any bell ring nor whistle sound; that he drove from point C, in a southwesterly direction, at a rate of about three and one-half to five miles per hour, leaving the door of his vehicle open, so as to hear a train, or the signals of a train, if any; that the first thing he "knew of a train was three toots of the whistle, when the engine struck" the vehicle, and the injury occurred; that at that time the plaintiff's horses were frightened, and standing on their hind legs; that it was a cold day, with the wind pretty nearly from the west; that Ninth street was substantially level each way from the crossing; that there was nothing to obstruct the view along the defendant's right of way to the southwest for a considerable distance; that the collision occurred about 3:55 o'clock p. m.; that the train left the depot in Oshkosh at 3:40 p. m.; that the fireman testified that he rang the bell and looked ahead as he approached the crossing; that the sun was shining directly in his eyes, which, with the snow on the ground, made it difficult for him to distinguish objects at a distance; that he did not see the team and wagon until the engine was right on the crossing; and he was corroborated by other testimony, but the plaintiff's rebutting testimony was to the effect that the sun was not shining at the time, and that it was cloudy.

1. For the purposes of this appeal, we assume, as found by the jury, that the train in question was at the time going at the rate of twenty-five miles per hour; that it did not ring the bell as it approached and passed over the Ninth street crossing, and that it did not blow the whistle at or near the whistling post for the Sixth street crossing, nor for the Ninth street crossing; and, hence, that the defendant was negligent. As stated by the learned trial judge, the main and controlling question in this case is whether the plaintiff was guilty of contributory negligence, in failing to look in the direction of the coming train after leaving point C. He regarded the question as a close one when he submitted it to the jury, and, after hearing the arguments for a new trial, concluded that it ought to be settled by this court.

At point C, the traveled track which the plaintiff followed turned from the north side of the street to a point at or very near the center of the street at the place of crossing the railway track, thus reducing the angle between such traveled track and the railway track from thirty-four degrees to about twenty-two degrees. The result was that in driving from point C to the point of collision, a distance of over eighty feet, the rear of the plaintiff's vehicle was towards the coming train. When the plaintiff stopped at point C, he had not reached the defendant's right of way; and his view in the direction of the coming train was necessarily obstructed by the red barn mentioned, so that he could only see down the track forty-four rods. Had he looked again, or in the first instance, when he had gone twenty-six feet nearer (that is to say, when he was sixty-two and one-half feet from the track by the line of travel), he could have seen down the track for a distance of 139 rods, and necessarily would have seen the train, and all would have been well. The plaintiff had stopped on Ninth street, at Negal's,—half a mile east of the place of collision,—about 3:30 p. m. That was ten minutes before the time for the train to start from the depot in Oshkosh. At that point he

was only about ninety rods from the railway track. As he advanced towards the crossing, he constantly came nearer and nearer to the railway track. At Dakota street, about seventy rods east of the crossing, he was only about forty rods from the railway track. At Idaho street, he was only about fifteen rods from the railway track. He was familiar with the time of the train, so at that point stopped and looked and listened. He necessarily knew that it had not yet passed. It was that conviction that made him stop and look and listen at point C. As he could only see down the railway track for a distance of forty-four rods, by reason of his view being partially obstructed by the red barn, can we say that he was in the exercise of ordinary diligence and care in driving from that point to the railway track, a distance of more than eighty feet, in a vehicle containing noisy implements, surrounded by canvas, and with the rear end of it towards the expected train, without stopping once to look or listen? We are clearly of the opinion that he was guilty of contributory negligence. The railway track was there for the purpose of running trains over it, and they were liable to pass at any moment. Even strangers were bound to know that fact,— much more, the plaintiff. He was bound to increase his vigilance as he approached the crossing. *Haetsch v. C. & N. W. R. Co.* 87 Wis. 304; *Nelson v. D., S. S. & A. R. Co.* 88 Wis. 396; *Schlimgen v. C., M. & St. P. R. Co.* 90 Wis. 194. To look when he was behind, or partially behind, some building, was no excuse for not looking when he reached the right of way, where he would have had an unobstructed view of the railway track for a distance of 139 rods.

The case is ruled by numerous adjudications in this court, only a few of which will be here cited: *Williams v. C., M. & St. P. R. Co.* 64 Wis. 1; *Schilling v. C., M. & St. P. R. Co.* 71 Wis. 255; *Seefeld v. C., M. & St. P. R. Co.* 67 Wis. 96; *Hansen v. C., M. & St. P. R. Co.* 83 Wis. 631; *Schmolze*

v. C., M. & St. P. R. Co. 83 Wis. 659; *McKinney v. C. & N. W. R. Co.* 87 Wis. 282; *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505. The case of *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, seemingly relied upon by counsel, is broadly distinguishable in its facts. In that case the plaintiff stopped and looked and listened after reaching the defendant's right of way, and when within between fifty and sixty feet of the railway track, and at a point where he could see along the track, in the direction of the coming train, at least 900 feet; and, besides, his attention was forced away from further looking by the conduct of his team. It was not the case of mere inadvertence or inattention, which is necessarily inexcusable in one approaching a railway track upon which a train is liable to pass at any moment, and hence is a known place of danger. What is there said about a person approaching a railway crossing, assuming that a train is moving at a lawful rate of speed, when "nothing appears to the contrary," has reference to the facts present in that case, and the facts present in *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 489, and similar cases. But, when the *Langhoff Case* came before this court the second time, it appeared that the deceased must have seen and known of the two approaching trains, and, hence, that no such assumption could be indulged. *Langhoff v. M. & P. du C. R. Co.* 23 Wis. 43. To the same effect, *Chase v. M. C. R. Co.* 167 Mass. 383. Certainly, the principle has no application to the case at bar, where the plaintiff might have seen, but neglected to look. The second finding of the jury, to the effect that the plaintiff was not guilty of contributory negligence, is contrary to the undisputed evidence; and hence a nonsuit should have been granted, or a verdict directed in favor of the defendant.

2. Counsel contends that because the statute makes railway corporations liable to any person injured for all damages caused by trains running at an excessive rate of speed in cities, such liability is absolute, and cannot be defeated,

even by the plaintiff's contributory negligence. Laws of 1891, ch. 467. The precise question has not been expressly decided by this court, although that statute has been mentioned in cases. *Nolan v. M., L. S. & W. R. Co.* 91 Wis. 21–24; *Wickham v. C. & N. W. R. Co.* 95 Wis. 26. Since that enactment, however, a number of cases have been decided by this court in which contributory negligence was held to defeat the action, notwithstanding the train was running at an excessive rate of speed in a village or a city. This was so in *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505, cited by the defendant's counsel. In that case the learned counsel for the plaintiff did not insist upon that statute in his oral argument, although they did cite the statute and make the point in their brief, and the question was, in effect, decided. In view of the numerous adjudications of this court upon statutes creating a liability in language just as emphatic as in the statute in question, it is very manifest that contributory negligence in the case at bar is a complete defense. Such is the statute creating a liability for "insufficiency or want of repair" of a public highway or street. R. S. 1878, secs. 1339, 1347. So the original statute making railroad companies liable for all damages sustained by failure to fence the right of way was held not to bar contributory negligence. Laws of 1872, ch. 119, sec. 30; S. & B. Ann. Stats. sec. 1810; *Curry v. C. & N. W. R. Co.* 43 Wis. 665, 683. The same rule applies to the liability created by statute for failure to guard or block the frogs in railway tracks. Laws of 1889, ch. 123; S. & B. Ann. Stats. sec. 1809*a*; *Holum v. C., M. & St. P. R. Co.* 80 Wis. 299; *Dugan v. C., St. P., M. & O. R. Co.* 85 Wis. 614. The same rule was applied to the statutory liability for not guarding dangerous machinery. *Thompson v. Edward P. Allis Co.* 89 Wis. 523. We must hold that the defendant is not barred from the defense of contributory negligence by the statute cited.

3. Error is assigned because the court charged the jury that: "'Proximate cause' means this: It means a moving cause, or an immediate or direct cause to the remote cause. And the question is, Was the defendant guilty of negligence that was the proxlmate cause of the plaintiff's injury?" This was error, under numerous and recent decisions of this court. *Davis v. C., M. & St. P. R. Co.* 93 Wis. 470–484; *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348; *Deisenrieter v. Kraus-Merkel Malting Co.* 97 Wis. 279; *McFarlane v. Sullivan, ante*, p. 361. Under the peculiar facts in this case, the error might not, of itself, work a reversal.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

---

99 388
100 604

99 388
116 1 63

FIEDLER, Executor, Respondent, vs. HOWARD, Appellant.
SAME, Appellant, vs. SAME, Respondent.

April 12 — May 3, 1898.

Conveyance to husband and wife: Joint estate: Consideration: Estoppel: Waiver of appeal.

1. A note and mortgage running to a husband and wife are held by them in joint tenancy, and upon the death of one go to the survivor, and not to the executor of the deceased for the payment of his debts.
2. The release by a wife of her dower and homestead interest in land sold is a good consideration to support an arrangement giving her a joint interest in the price received therefor.
3. A party who is, by a judgment, absolutely entitled to a sum of money does not, by accepting that money, waive or become estopped from prosecuting an appeal which does not involve a reversal of that part of the judgment under which he takes the money.
4. A plaintiff in an action involving rights to a certain fund cannot avail himself of the objection to defendant's appeal therein that the latter has accepted the fruit of the judgment in her favor,

when he himself has, by objecting to the settlement of a bill of exceptions by her, compelled her to file a bond securing the disposition of the fund as may be determined on the appeal, and has thus, in effect, secured the fruits of the judgment, and has appealed.

APPEALS from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of the defendant.*

In his lifetime, one Henry Howard was the owner of eighty acres of land, occupied by himself and his wife, *Catherine Howard*, the defendant, as their home, forty acres of which was their homestead. Being desirous of selling the same, Howard procured a deed to be drawn to one Conrad Stude, but his wife refused to sign the same. By the terms of the sale, Stude was to pay $400 cash, and execute a mortgage on the premises for $1,500. As a condition of the defendant executing the said deed, it was agreed between her and her husband that the mortgage and note to be executed by Stude should be made payable to her and her husband. Pursuant to this agreement, the deed was executed and delivered to Stude, and the note and mortgage were executed by him to Henry Howard and *Catherine Howard* as payees. On January 19, 1893, Howard borrowed $200, on a note signed by himself and wife, from one White; and, as collateral security for the same, they assigned said note and mortgage to him. On November 19, 1894, Howard died testate. On January 11, 1895, the defendant borrowed the sum of $212 from the First National Bank of Mineral Point, and paid the White note, took an assignment of said note and mortgage to herself, and made another assignment to the bank to secure the payment of the amount borrowed. Plaintiff was named as executor in Howard's will, which was duly probated, and he accepted the trust. The plaintiff, as executor, demanded the note and mortgage from defendant; but she refused to deliver the same to him,

claiming to be the sole owner thereof. The plaintiff then commenced this action, claiming in his complaint that Howard was the sole owner of the Stude note and mortgage, that the defendant fraudulently and surreptitiously procured her name to be inserted as joint payee therein without the knowledge or consent of Howard, and that she claimed to be the sole owner thereof. The complaint also alleged a demand, and that Howard had no other estate, and died owing various persons, in the aggregate about $600; that defendant had collected $90 interest on said note and mortgage, and threatened to collect the whole amount due thereon, and convert the same to her own use. The answer, after admitting and denying certain allegations of the complaint, sets up the facts substantially as before stated.

The court found, in addition to the facts hereinbefore set forth, that Howard left no estate except his interest in the mortgage and note, and that he left debts unpaid to the amount of several hundred dollars, not yet definitely ascertained; that defendant's name was not fraudulently or surreptitiously inserted in the mortgage and note; and that defendant had collected two years' interest thereon, amounting to $180. As conclusions of law, the court found that, so far as the creditors of Howard were concerned, the note and mortgage, and interest collected thereon, must be held to have belonged one half to each,—Mr. and *Mrs. Howard*,—and that the creditors were entitled to be paid out of the half belonging to Mr. Howard; that plaintiff, as executor, was entitled to the possession of the note and mortgage, and to collect the amount due thereon, and should pay the bank the amount due on the note of *Mrs. Howard*, mentioned, and divide the remainder, taking into consideration the interest collected by defendant, giving her one half, and out of the other half pay the debts of Howard, funeral expenses, and costs of administration, and any amount remaining was to be paid to defendant; that it was not the intention of Mr.

and *Mrs. Howard* that this mortgage fund should be kept together until the death of one of them, so that the other might take it; it constituted a fund upon which they relied for support; that the creditors trusted Howard on the strength of this fund, and are entitled to his share, as though he had realized his part of the mortgage in his lifetime.

Judgment was entered pursuant to these findings. Exceptions to the findings were duly taken, and defendant attempted to settle a bill of exceptions. An order extending the time to settle the bill was made by a court commissioner, and upon a motion to vacate the same, before the court, the court made an order in which he found that, prior to the entry of said judgment, said note and mortgage had been paid in full to said bank, who held the same subject to the direction of the court, and after the entry of judgment had paid the entire amount thereof, except the amount due the bank as specified therein, to the plaintiff; that thereupon plaintiff paid defendant one half of the remainder, $770.77, and retained the other part himself; that defendant was insolvent and irresponsible financially. The court thereupon set aside the order of the court commissioner, and struck out the bill of exceptions proposed by defendant. He further ordered that if, within thirty days, defendant should file a penal bond in the sum of $1,200, conditioned that in case both parties should appeal to the supreme court, and that court should decide that plaintiff was entitled to the whole of said fund, then defendant should pay plaintiff the amount she had received, upon these conditions defendant would be permitted to serve and settle her bill of exceptions. The bond was filed, and the bill thereafter settled.

The plaintiff appealed from that portion of the judgment which limited the plaintiff's right to one half of the mortgage, and from so much as required the plaintiff to pay any portion of the avails of said mortgage to defendant prior to the payment of the debts of Howard, deceased. Defendant appealed from the entire judgment.

P. A. Orton, for the plaintiff, among other things, argued that the defendant could not have the benefits of such provisions of a judgment as were in her favor, and appeal from those against her. *Webster-Glover L. & M. Co. v. St. Croix Co.* 71 Wis. 317; *Hixon v. Oneida Co.* 82 id. 515, 529; *Flanders v. Merrimac*, 44 id. 621; *Cogswell v. Colley*, 22 id. 399; *Carll v. Oakley*, 97 N. Y. 633; *Murphy v. Spalding*, 46 id. 556; *Bennett v. Van Syckel*, 18 id. 481. The defendant had no right in the land sold except that derived from her husband, and that must yield to the rights of his creditors. *Wait v. Bovee*, 35 Mich. 425; Stewart, Husband & W. § 311; *Allen v. Perry*, 56 Wis. 178; *Borst v. Spelman*, 4 N. Y. 284; *Scott v. Simes*, 10 Bosw. 314, 320; *Sanford v. Sanford*, 45 N. Y. 723, 726; *Christ's Hospital v. Budgin*, 2 Vern. 683; 1 Randolf, Comm. Paper, § 325; *Wilder v. Aldrich*, 2 R. I. 518; *Allen v. Tate*, 58 Miss. 585; *Richardson v. Daggett*, 4 Vt. 336; 1 Bright, Husband & W. 32; *Putnam v. Bicknell*, 18 Wis. 334; *Miller v. Aram*, 37 id. 142; *Cummings v. Friedman*, 65 id. 183. There is no analogy between tenancy by the entirety in real estate, and the rights of husband and wife in a security payable to both. 9 Am. & Eng. Ency. of Law, 850.

For the defendant there was a brief by *Spensley & McIlhon*, and oral argument by *Calvert Spensley*.

Bardeen, J. The main question arising on this appeal is whether the defendant is entitled to the whole amount of the mortgage given by Stude, or only to one half, as found by the trial court. Counsel for plaintiff concede that, as against the heirs or next of kin of Howard, the wife, as survivor of her husband, is entitled to the mortgage and the proceeds therefrom. But it is said Howard left creditors, and that his estate is insufficient to pay them; that it was the intention of Howard to make a gift to his wife; and that she cannot hold the mortgage so long as there are unpaid creditors. The third finding, which is amply supported by

the evidence, is, substantially, that Howard owned eighty acres of land, forty of which was his homestead. He desired to sell, but his wife refused to sign the deed so as to cut off and bar her dower and homestead interests. It was then agreed that, if she would sign the deed, the note and mortgage to be given by the purchaser for part of the purchase money should be made payable to Howard and his wife jointly. This deal was consummated October 22, 1891, and Howard died November 19, 1894. Upon these facts the court concludes that, so far as the creditors of Howard are concerned, this mortgage belonged *one half* to each — to Mr. and *Mrs. Howard.* We are not referred to any item of evidence or finding of fact that tends even remotely to support this conclusion.

The status of Mr. and *Mrs. Howard* with reference to this mortgage must be determined as of the time of the transaction. Sec. 2068, R. S. 1878, says that "all grants and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy." The succeeding section (2069) says, "The preceding section shall not apply to mortgages, nor to devises, or grants made in trust, or made to executors, or to husband and wife." The doctrines of the common law must therefore be applied to this transaction, as it comes clearly within the exception of the statute. The rule that there may be a joint tenancy of personalty is recognized and upheld in *Farr v. Trustees of Grand Lodge A. O. U. W.* 83 Wis. 446, and the right of survivorship is maintained. In *Draper v. Jackson*, 16 Mass. 480, it was decided that a note and mortgage made to husband and wife shall go to the wife, if she survive her husband, and not to the executor of the husband. This was in recognition of the common-law rule that, when an estate is granted to husband and wife, they take by entireties, and not by moieties. *Ketchum v. Wals-*

worth, 5 Wis. 95; *Brown v. Baraboo*, 90 Wis. 151. In the matter of real estate, the husband could not incumber or alienate such an estate so as to prevent the wife, and her heirs after his death, from enjoying it discharged from his debts and engagements. He might, as held in *Bennett v. Child*, 19 Wis. 362, alienate his life estate, but could not give title that would be available to his grantee if his wife survived him.

There is no claim in the case at bar that the transaction in question was entered into to defraud creditors. Even were this so, it could not be disturbed under the proof in this case. Forty acres of the land conveyed, and which merged in this mortgage, was the homestead of the parties, and exempt from the claims of all the creditors. There being no proof as to the value of the homestead forty, the court would not be justified in taking any part of this fund to pay creditors. It may well be that the $400 in cash paid by Stude, at the time of the execution of the deed, to Howard, was the full value of the nonexempt forty. At any rate, without proof to show that this mortgage included the purchase price of nonexempt property, the court would have no authority to apply it to the payment of creditors, if it be admitted the creditors might follow it. The transaction was in no sense a gift to the wife. The release by the wife of her dower and homestead interest was a good consideration to support this arrangement. See *Allen v. Perry*, 56 Wis. 178. The conclusion of the trial court, that "it must be presumed that the creditors trusted Howard on the strength of this fund, and they are as much entitled to his share as though he had realized his part of the mortgage in his lifetime," was made under a misapprehension of the law. There was nothing unfair or unjust in the transaction; nor does it appear to have been done with any fraudulent design to secrete his property, or put it beyond the reach of creditors.

It may be doubted if there was any legal proof before the

court that there were any creditors. The only proof on that subject was the production of some unauthenticated bills alleged to have been filed with the county judge. So far as appears, none of these claims were ever allowed by the county court against Howard's estate. The records of the county court were not identified, except by testimony that they were in the handwriting of the county judge. The mere production of a lot of unauthenticated bills is hardly sufficient to sustain a finding that deceased left unpaid debts. So, under the proof in this case, the court plainly erred in holding that the plaintiff was entitled to any portion of this mortgage fund.

It is said, however, that the defendant waived her right of appeal, because she has accepted the provisions of the judgment made for her benefit. If this be true, the facts disclosed by the record would be equally fatal to the plaintiff's appeal. He has, quite as much as the defendant, accepted the fruits of the judgment, and, having come here himself, cannot be heard to question the right of his opponent to appeal. But the plaintiff has done more to estop himself. When the defendant sought to settle the bill of exceptions, plaintiff insisted, and at his request the court ordered, that the defendant, as a condition of permitting service of a bill of exceptions, should file a bond conditioned as set forth in the statement of facts. The filing of this bond, in legal effect, restored the plaintiff to his rights substantially as they stood before he paid any money to defendant. Having demanded the bond as a condition for granting relief to defendant, he cannot appear here in very good grace, and urge the objection noted. He comes fairly within the principle decided in *Cook v. McComb*, 98 Wis. 526, and cases cited, although not within the letter of the decision.

The question of the waiver of the party's right to appeal by acceptance of benefits under an order or judgment has been before this court in a number of cases. *Cogswell v.*

Colley, 22 Wis. 399; *Flanders v. Merrimac*, 44 Wis. 621; *Webster-Glover Lumber & Mfg. Co. v. St. Croix Co.* 71 Wis. 317; *Hixon v. Oneida Co.* 82 Wis. 515; *Laird v. Giffin*, 84 Wis. 286; *Wirth v. Bartell*, 89 Wis. 594. And, because there has been some little inaccuracy of statement in some of the cases, it has been thought best that the question be set at rest. In *Cogswell v. Colley*, Mr. Justice PAINE rightfully holds that, where a new trial has been granted on condition that defendant shall pay the costs of the former trial, plaintiff cannot accept the costs and then maintain an appeal from the order. It is based on the idea that a suitor will not be permitted to assume the inconsistent position of complaining against the order, and at the same time accepting the fruits of it. The learned justice, however, recognizes the distinction which we wish to emphasize; and that is that, where a party is entitled to a certain sum of money absolutely under a judgment, he is not, by accepting that money, precluded from prosecuting an appeal which does not involve a reversal of that part of the judgment or decree under which he takes the money. This we believe to be the true rule, and in accordance with correct ideas of the law. The effort of the courts is to prevent parties assuming inconsistent positions, and "blowing hot and cold" in the same breath. If the benefit received is dependent upon, or was granted as a condition of, the order or judgment attacked, clearly the party ought not to be permitted to carry on his warfare. But if the conditions of the order or judgment under which he is granted a favor are independent and separable from those sought to be overturned, there seems to be nothing in reason or justice to prevent him from seeking to vindicate in the appellate court the right denied him in the trial court. This right was sanctioned in New York in the early case of *Clowes v. Dickenson*, 8 Cow. 328, and has since been followed in that state by an unbroken line of decisions. *Benkard v. Babcock*, 27 How. Pr. 391; *Higbee v. Westlake*, 14 N. Y. 281;

Farmers' Loan & Trust Co. v. Bankers & Merchants' Tel. Co. 109 N. Y. 342; *Mellen v. Mellen*, 137 N. Y. 606.

In *Flanders v. Merrimac*, 44 Wis. 621, the plaintiff applied for a change of venue. The court granted the application *on condition* that he pay certain costs. He paid the costs, and took the order changing the place of trial; and TAYLOR, J., says, "And it would seem equally clear that the applicant, having taken the benefit of the order conditioned upon the payment of costs, cannot now appeal and get rid of the condition." It will be seen that emphasis is laid upon the conditional character of the relief granted, and that, having accepted the order upon the terms imposed, he has waived his right to appeal. This case is cited to sustain the decision of this court in *Webster-Glover L. & M. Co. v. St. Croix Co.* 71 Wis. 317. The action was to set aside certain taxes. The court found that a part of the taxes were valid and a part invalid, and entered an order requiring the plaintiff to pay into court the valid tax, and rendered judgment setting aside the invalid tax. The defendant claimed that the entire tax was valid. The money paid into court was paid over to defendant. The defendant then appealed, and sought to have the judgment reviewed. The decision was to the effect that, having accepted this money, the defendant was precluded from pursuing its appeal, on the ground that to allow it to do so would "be contrary to that just principle which forbids one from claiming under, and at the same time repudiating, any instrument;" also, citing the *Cogswell Case*. The judgment of the trial court provided that the payment by plaintiff of the sum specified should be in full payment, satisfaction, and discharge of all taxes upon its lands. Perhaps this decision can be supported upon the ground that the acceptance of this money was an acceptance by defendant of the conditions of the judgment; but, independent of the conditional character of

the judgment, no good reason is perceived why the defendant might not have received the amount adjudged absolutely to be its due, and still have sought to secure the tax decreed to be void. The provision of the judgment as to the taxes decreed to be valid and those declared invalid were separable and independent, and on the defendant's appeal only those parts of it put in peril were those that related to the invalid tax. It is only when the appellant stands in the attitude of holding the fruits of the judgment to which he may not be entitled if his appeal succeeds that the rule stated applies. *Alexander v. Alexander*, 104 N. Y. 643. In this view, the headnote to *Laird v. Giffin*, 84 Wis. 286, is somewhat misleading. The conditional character of the judgment is noted in the opinion, but not recognized or stated in the syllabus. So what is said in *Hixon v. Oneida Co.* 82 Wis. 515, on page 530 of the opinion, must be read in view of what we have heretofore said on this subject. *Wirth v. Bartell*, 89 Wis. 594, may be consulted with profit, as illustrating the view we have taken.

The application of these principles to the case at bar, independent of the attitude of the parties to each other, as before noted, leads us to the conclusion that the defendant has not waived her right of appeal. So far as her case is concerned, and upon her appeal, she stands in no peril of losing what she has received. Under the judgment rendered, she is entitled absolutely, by independent and separable provisions, to the money she has received. The money paid her was not paid under any circumstances of accord and satisfaction of the judgment, or under any conditions of the judgment that induced the plaintiff to make such payment. The view we have taken renders necessary a reversal of those portions of the judgment giving the plaintiff any right to the mortgage fund. If it be true that plaintiff has collected the mortgage debt, the new judgment should be in such form

as to protect the defendant's interest, and secure payment to her of the entire amount unpaid, less the amount retained by the bank in payment of defendant's note.

By the Court.— Those portions of the judgment of the circuit court above alluded to are reversed, and the balance of the judgment is affirmed, and the cause is remanded with directions to enter judgment for the defendant in accordance with this opinion.

CARROLL, Respondent, vs. THE CHICAGO, BURLINGTON & NORTHERN RAILROAD COMPANY, Appellant.

99 399
105 349
99 399
d108 67
99 399
d109 463
99 399
116 1 33

April 12 — May 3, 1898.

Negligence: Fellow-servants: Practice, question for special finding.

1. Where the evidence showed that the window in defendant's office, where employees were usually paid, and the catch for fastening it, were in perfect condition, so that the window could not fall if the catch was properly fastened, and that when such window had been raised by the defendant's servant, that he might receive a check presented by the plaintiff, it fell upon and injured the plaintiff's hand resting on the window ledge, a presumption of negligence arises from the very happening of such accident.
2. Where, in such a case, the plaintiff, was not in the employ of the defendant, but was present for the purpose of obtaining the pay of an employee who had quit its service some time before, he cannot be deemed a co-employee with the servant who raised the window.
3. It is not essential, under the provision of sec. 2858, R. S. 1878, authorizing the court to direct the jury to find upon any particular question of fact, that the question submitted should cover all the issues in the case.

APPEAL from a judgment of the circuit court for Crawford county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This was an action for personal injuries sustained by the plaintiff while presenting an order for a pay check in favor

of one William Malloy, a former employee of the defendant, at the window of the pay office of the defendant at La Crosse, Wisconsin. The facts shown upon the trial were, in brief, as follows:

On the 16th of April, 1895, the plaintiff went to the pay office to get the pay check of his son-in-law, Malloy, who had formerly worked for the defendant, but had quit previous to this time. It was pay day, and all the men who were to be paid stood in line outside of the pay office; and the window was raised by one Dolson, the clerk in the office, and the men advanced to the window one by one. The window was opened by Dolson, and the men received their checks as their names were called. The window was an ordinary two-light sash, and was provided with a catch inside, which, when set, held it up. When Malloy's name was called, the plaintiff asked for Malloy's pay check, and was told by Dolson that he would have to have an order before he could get it. The plaintiff then went away, and obtained an order from Malloy, and when he returned the men were all gone from the window, and it was shut. The plaintiff came up to the window, and attracted the attention of Dolson, and Dolson opened the window about a foot, and attempted to fasten it with a catch; and the plaintiff passed in the order, and Dolson took it out of his hand. The plaintiff's hand rested upon the window ledge, which was about four and a half feet from the ground. Dolson turned towards the table in the office where the paymaster was sitting; and the window suddenly fell, striking one of the fingers of the plaintiff's right hand, and injuring it so that amputation was necessary. It was shown that the window was in good condition, and that the catch was in perfect order, and that the window had never fallen either before or since the accident.

At the close of the testimony the defendant moved that a verdict be directed for the defendant on the ground that

no negligence had been shown, and that the plaintiff was a mere licensee, or, if not, that he stood in the place of a fellow-servant with Dolson. This motion was overruled, and exceptions taken; and the court, of its own motion, submitted certain questions to the jury, which questions and their answers are as follows: "First. Did Dolson, at the time he raised the window to receive the order from the plaintiff, fasten the window with the usual window fastening? A. No. Second. If you answer the last question 'Yes,' you need answer no other question; but, if you answer it 'No,' then answer this question: Was the failure of Dolson to fasten the window the proximate and efficient cause of the window's falling upon the finger of the plaintiff? A. Yes. Third. As a reasonable man, ought Dolson to have anticipated that a natural, reasonable, and probable consequence of his failing to fasten the window would be an injury to the plaintiff? A. Yes. Fourth. Did any want of ordinary care upon the part of the plaintiff contribute to cause the injury to his finger? A. No. Fifth. If the court should determine that the plaintiff is entitled to judgment, at what sum do you assess the damages he is entitled to recover? A. Amount, four hundred dollars ($400)." A general verdict was also rendered by the jury, in addition to the special questions, by which they found for the plaintiff, and assessed his damages at $400.

From judgment for the plaintiff, upon this verdict, the defendant appeals.

For the appellant there were briefs signed by *Losey & Woodward*, attorneys, and *Andrew Lees*, of counsel, and oral argument by *G. M. Woodward*. They argued that in this case negligence could not be found from the mere fact that the accident occurred and the inference that it could not have occurred without carelessness on the part of defendant's servant in failing to set the catch. It differs from the

case of *Cummings v. Nat. Furnace Co.* 60 Wis. 603, in that there was evidence that such servant did set the catch. There was no testimony to show that he could reasonably have anticipated the accident. Plaintiff was acting in behalf of and as a substitute for one who was a co-employee of defendant's servant, and was himself therefore to be deemed such co-employee. *Johnson v. Ashland Water Co.* 71 Wis. 553; *Anderson v. Guineau*, 9 Wash. 304; *Osborne v. K. & L. R. Co.* 68 Me. 49; *Degg v. Midland R. Co.* 1 Hurl. & N. 773; *Wischam v. Rickards*, 136 Pa. St. 109.

For the respondent there was a brief by *F. E. Withrow*, attorney, and *Doherty & Baldwin*, of counsel, and oral argument by *F. E. Withrow* and *John F. Doherty*.

WINSLOW, J. The defendant's contention is that there is no evidence in the case showing negligence, and that the accident was not one from the happening of which, alone, negligence can be inferred. The evidence shows beyond dispute that the plaintiff came rightfully to the window to present the order for Malloy's pay, pursuant to an express invitation by the defendant's employee Dolson, and in accordance with the custom established by the defendant, of paying off its employees through this open window. It certainly would be very natural for persons advancing to the window for such purpose to reach their hands partially through the open window, or rest them upon the ledge, and the testimony showed that such acts were frequent and customary. Under such circumstances, the verdict of the jury, to the effect that such an injury as happened to the plaintiff ought reasonably to have been anticipated, is based upon sufficient testimony. The evidence also showed without contradiction that the window and the catch were both in perfect condition, and that the window had never been known to fall before or since, and would not fall if the catch were

properly set. These facts clearly show that the fall of the window must have resulted from Dolson's failure to set the catch, and makes the accident one where a presumption of negligence is raised from the mere fact of the happening of the accident itself. The evidence being conclusive that the window and the catch were in good order, it follows that the negligence so presumed must have been in the failure to properly set the catch. *Cummings v. National Furnace Co.* 60 Wis. 603. Quoting from a sentence approved in that case: "When the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." It is true that the agent, Dolson, testified that he set the catch, but we do not regard this testimony as conclusive upon the jury upon this question. The answers to the special questions are therefore supported by sufficient evidence.

There is a further claim made that *Carroll* must be considered a co-employee of Dolson. The evidence shows, however, that the plaintiff was not in the employ of the defendant, and that Malloy had at some previous time been an employee, but had quit prior to the time of this accident; so this claim necessarily falls to the ground.

It was suggested that the answers to the special questions do not find negligence, but only that Dolson did not fasten the window, and that the failure to fasten the window is not necessarily negligence. This was not a special verdict, but the court of its own motion submitted to the jury certain particular questions of fact in addition to the general verdict. R. S. 1878, sec. 2858. In such case there is no requirement that the special questions submitted shall cover all the issues in the case. There being a general verdict, it necessarily covers all the issues, and there are no exceptions to

the charge, and no additional instructions were asked by the defendant.

In any view which we have been able to take of the case, we have been unable to find any error.

By the Court.—Judgment affirmed.

DYER, Respondent, vs. WALKER, Appellant.

April 12—May 3, 1898.

Easement by prescription: Gate across right of way: Trespass.

1. The owner of a right of way across the land of another, whether it was acquired by grant or by prescription, is entitled only to a reasonable and usual enjoyment thereof, in view of all the circumstances of the case and of the use then and theretofore made of the premises affected by it, and the owner of the soil is entitled to all the rights and benefits of ownership consistent with the easement.
2. The owner of land which is subject to a right of way may maintain a gate across such way, if it is necessary to his use and enjoyment of his land and does not unreasonably interfere with the use of the way.
3. Where a gate erected across a right of way by the owner of the land burdened with the easement does not unreasonably interfere with the use of the way, the removal of such gate by the owner of the easement is a trespass.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This was an action of trespass, tried by the court; and it was found that the plaintiff was the owner in fee simple and in possession of forty acres of land, to wit, the S. E. ¼ of the S. E. ¼ of section 10, township 5, range 3, in Grant county, which was improved farming land, inclosed by substantial fences, a public highway crossing said tract in an easterly and westerly direction near its south line. The de-

fendant owned and occupied as his homestead farming lands which bounded said tract of land on the north, and the defendant had a private right of way one rod in width across said tract, commencing at a point about five chains westerly from the southeast corner thereof, and extending thence in a northerly direction across said tract to the north line thereof, which is the south boundary of the lands owned by the defendant, which right of way was acquired by prescription, and the existence of which had been adjudged and confirmed by the judgment of the circuit court for Grant county, in an action between these parties rendered at its October term, 1894.

Prior to 1894, a part of that part of said forty-acre tract of land lying to the west of said private right of way was improved farming land, inclosed by fences, and the remainder thereof was uninclosed, and lay out to commons. The plaintiff inclosed the whole forty-acre tract with fences, and commenced to clear and improve that part of the tract which had theretofore been common. At each end of the defendant's private right of way, there is a gate where it crosses the north and south boundaries of said tract, and that part of said tract of land which lies north of the said public highway is partly pasture land, and partly land that is suitable for plow land. In the spring of 1896 the plaintiff plowed and planted to corn and other cultivated crops a piece of land in the southeast corner of said tract, containing about four acres, to wit, all the cleared land in said southeast corner thereof; and more of the said southeast portion of said land would be planted to corn and other crops as soon as the timber should be cleared therefrom; and the north part of said tract, on account of the character of its surface and its proximity to other pasture lands of the said plaintiff, was suitable only for the pasturing of live-stock. In order that the plaintiff might have the use of the north

part of said forty-acre tract of land (about twenty-five acres) for pasturage, and the south part for the growing of cultivated crops, it was necessary that the said plaintiff should separate said pasture land from the cultivated lands by means of a substantial fence which would have to be built across the said private way of the defendant.

It was further found that such use of said forty-acre tract of land was reasonable, and that a fence built across said private way of the defendant with a good and serviceable gate well hung, so as to leave a passageway of about twelve feet in width, was not an unreasonable obstruction of said defendant's right of way across said plaintiff's tract of land; that on or about July 11, 1896, the plaintiff, in order to protect his crops then growing in the southeast portion of said tract, and in order that he might use for pasturage the northern part of said tract, built a fence in an easterly and westerly direction across the said tract of land, and across said defendant's private right of way; that in said fence, and where the same crossed the defendant's right of way, he hung a gate for the use of said defendant, so as to leave a passageway twelve feet wide; that the building of said fence was necessary to the convenient and profitable use by the said plaintiff of his said forty-acre tract of land; that said fence and gate across said defendant's right of way were reasonable as to their position and construction; that in August, 1896, the defendant took down said gate, and removed the gate posts, and, in so doing, damaged said fence in the sum of one dollar; that, on account of the taking down of said gate, the plaintiff suffered damages by the loss of the use of said pasture land in the northern part of said tract in the sum of $49; and that the erection of such gate over and across said defendant's private right of way only slightly inconvenienced the defendant in his use thereof; and that to deny the plaintiff the right to maintain said

fence with the gate where it crossed said defendant's right of way would deprive the plaintiff of the use of a considerable portion of his said forty-acre tract of land.

The court found, as conclusions of law, that the plaintiff should recover against the defendant the sum of $50 as damages which he had suffered from the removal of said plaintiff's gate and the posts on which it was hung, together with the costs and disbursements of the action. Judgment was entered accordingly, from which the defendant appealed.

For the appellant there was a brief by *Clark & Taylor*, and oral argument by *S. H. Taylor*. To the point that the plaintiff had a right to place gates only at the *termini* of the way, they cited *Joyce v. Conlin*, 72 Wis. 607; *Johnson v. Borson*, 77 id. 593; *Shivers v. Shivers*, 32 N. J. Eq. 578; Goddard, Easements, 331; *Ward v. Warren*, 82 N. Y. 265; *Richardson v. Pond*, 15 Gray, 387; Wood, Nuisances (1st ed.), §§ 164–168; *Frankboner v. Corder*, 127 Ind. 164.

For the respondent there was a brief by *Lowry & Clementson*, and oral argument by *E. M. Lowry*.

PINNEY, J. The finding of the court is abundantly sustained by the evidence, and we think the pleadings and facts found clearly sustain the judgment. The defendant had an easement over the tract of land of the plaintiff, but his rights are confined to a reasonable use of the way which he had acquired by prescription, in view of all the circumstances of the case and the use then and theretofore made of the premises affected by it. It is expressly found that the building of the fence in question was necessary to the convenient and profitable use by the plaintiff of his said forty-acre tract of land, and that said fence and gate across the defendant's private right of way were reasonable as to their position and construction, and that the erection of the gate over the same only slightly inconvenienced the defendant in his use of said right of way, while to deny plaintiff the right to maintain

a fence with a gate where it crossed said right of way would deprive him of the use of a considerable portion of this forty-acre tract of land. In *Wille v. Bartz*, 88 Wis. 424, it was held, in accordance with previous cases there cited, that the owner of land subject to a right of way may maintain a gate across the way if such gate is necessary to the reasonable use and enjoyment of his land, and does not unreasonably interfere with the use of the way. *Whaley v. Jarrett*, 69 Wis. 613. And in *Sizer v. Quinlan*, 82 Wis. 390, 392, it was held that the owner of an easement may not fence in the way, and thereby exclude the owner of the fee from such uses as he may make of his land not inconsistent with the easement. The plaintiff, the owner of the soil of a way, whether public or private, may make any and all uses of it to which the land can be applied, and take all profits which can be derived from it, consistently with the enjoyment of the easement. All rights which are consistent with the reasonable exercise of the easement remain with the grantor. Whether acquired by grant or by prescription, from which a grant may be implied, it was only an easement that was acquired by the defendant; and he is entitled only to a reasonable and usual enjoyment thereof. Subject to that, the right of dominion and use is in the plaintiff, to the exclusion of all others. As owner of the soil, he had all the rights and benefits of ownership consistent with the easement. *Brill v. Brill*, 108 N. Y. 511, 516; *Johnson v. Borson*, 77 Wis. 593.

The defendant, under the facts stated, was the owner of the dominant estate, for the benefit of which the easement existed; and the plaintiff's was the servient estate, burdened with the easement in question. It is said in Goddard, Easem. (Bennett's ed.), 332, 338: "The only obligation upon the servient owner is that he shall not unreasonably contract the width of the road, or render the exercise of the right of passing substantially less easy than it was at the time of the

grant. And even where a right of way was granted over certain roads marked on a plan, and one was described there as forty feet wide, it was held that the grantee was entitled to only a reasonable enjoyment of a right of way, and that such reasonable enjoyment was not interfered with by the erection of a portico which extended a short distance into the road, so as to reduce it at that point to somewhat less than forty feet." It would seem that, whether created by grant or acquired by prescription, in point of width the way need be only such as is reasonably necessary and convenient for the purpose for which it was used or granted. *Atkins v. Bordman*, 20 Pick. 291.

The judgment of the circuit court is clearly in conformity with the principles recognized and laid down in the authorities cited, and must therefore be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

PERKINS, Respondent, vs. JACOBS, Appellant.

April 12—May 3, 1898.

Appeal: Affirmance on failure to prosecute: Damages for delay.

1. If, when a cause is reached for argument in the supreme court, it is submitted or represented by the respondent by counsel, and is not so submitted or represented by the appellant, the judgment will, under Rule XVII, be affirmed.
2. Where it appears on appeal that from the commencement of the action until that time the defendant has pursued a policy of delay for the mere purpose of delay, and has neither settled any bill of exceptions nor made any record to present to the court for review, he may properly, under sec. 2951, R. S. 1878, be punished by the addition of damages to the judgment, on affirmance, besides costs and interest. Ten per cent. damages added in this case.

APPEAL from a judgment of the circuit court for Monroe county: O. B. WYMAN, Circuit Judge. *Affirmed.*

This is an action to recover damages for an alleged malicious prosecution. The cause was noticed for trial at the October, 1895, term of the circuit court for Sauk county, at which, on motion of defendant, it was continued to the March term, 1896. At such March term an order was made on motion of defendant's attorney, based on an affidavit in due form of law, changing the place of trial to Monroe county on the ground of the prejudice of the trial judge. Defendant failed to comply with the statute as to payment of clerk's fees so as to make the order effective, whereupon the judge of the circuit court for Monroe county remanded the case to the circuit court for Sauk county. At the first term of the court for the latter county, after the case was remanded, a second order was duly made, changing the place of trial to Monroe county. At the first term of the circuit court for such county thereafter, the case was duly noticed for trial, but it was continued on application of the defendant's attorneys to the October term, 1896, when it was finally tried, resulting in a verdict in plaintiff's favor for $350, damages. The judgment was entered on the 24th day of October, 1896, for $771.32, damages and costs; and notice of the entry thereof was duly given. On the 13th day of January, 1897, defendant's attorneys perfected an appeal to this court, but no bill of exceptions was settled. Defendant failed to pay the costs of the clerk of the circuit court so as to secure a prompt transmission of the papers to this court, whereupon a motion was made by the plaintiff to dismiss the appeal, which was denied on condition of the payment by defendant of $10 costs, the record having been filed, though out of time. When the case was reached for argument in its order in this court, there was no printed case or briefs on file on the part of defendant, and none had been served on the opposite party, or any preparation made, so far as appears, for prosecuting the appeal in good faith to a termination.

[No appearance for the appellant.]

Herman Grotophorst, for the respondent.

MARSHALL, J. When the cause was reached for argument respondent's counsel moved for an affirmance of the judgment under the rules, and for damages for delay caused by the appeal. Rule XVII provides that when a cause is reached for argument and is submitted or represented by the respondent by counsel, and not so submitted or represented by appellant, the judgment shall be affirmed without argument. That requires the judgment here to be affirmed.

Sec. 2951, R. S. 1878, provides that the supreme court may, in its discretion, adjudge to the respondent in any appeal in any civil action, on affirmance, damages for his delay in addition to interest, not exceeding ten per cent. on the amount of the judgment affirmed, and may also, in its discretion, award to him double costs. It was intended thereby to deter parties from taking appeals merely for delay, and it has been often, but by no means too frequently, applied in cases of frivolous appeals taken in bad faith. *Slocum v. Carlton*, 2 Pin. 203; *Ramsay v. Davis*, 20 Wis. 31; *Sweet v. Davis*, 90 Wis. 409. This case seems to call for statutory punishment under that rule. From the commencement of the action in the lower court up to the time it was called for argument in this court, the defendant appears to have pursued a policy of delay for the mere purpose of delay. The fact that no bill of exceptions was settled, and no record made to present any question for review in this court, leaves no room for any theory other than that the appeal was solely to further delay the enforcement of a just judgment. Therefore—

By the Court.— The judgment of the circuit court is affirmed with costs, and with ten per cent. damages to the plaintiff in addition to interest, as a penalty for the needless delay caused by the appeal.

FIELD, Respondent, vs. THE CITY OF ELROY, Appellant.

April 13 — May 3, 1898.

Appeal: Difficult question of law as to costs involved.

1. Under ch. 215, Laws of 1895, as amended, if a judgment for less than $100 without costs is rendered in plaintiff's favor, and the only question in controversy is as to whether defendant is entitled to costs, he may appeal from the judgment to test that question if the trial judge certifies the facts and that the case involves some question of law, specifying it, of such doubt and difficulty as to require the decision of the supreme court.
2. Under secs. 2918, 2920, S. & B. Ann. Stats., if plaintiff recovers less than $100 in an action commenced in the circuit court on contract, the defendant is entitled to costs.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Juneau county: O. B. WYMAN, Circuit Judge. *Reversed.*

This case comes up on a certificate of the trial judge. Such certificate is, in substance, as follows: The judgment rendered against the defendant is less than $100 without costs. The case necessarily involves a question or point of law of such doubt and difficulty as to require the decision of the supreme court. The action was commenced in the circuit court on contract for an amount within the jurisdiction of a justice of the peace. Plaintiff sought to recover $38.50. A trial was had, resulting in a verdict for $23.10. Both parties claimed costs before the clerk. Costs were allowed by such clerk in favor of the defendant for $61.02. On appeal from such taxation to the court, costs were denied to either party, and judgment rendered in plaintiff's favor for the amount of the verdict. The question of law is, Was the defendant entitled to costs? The appeal is by the defendant.

J. T. Dithmar, attorney, and *H. W. Barney*, of counsel, for the appellant.

For the respondent there was a brief signed by *J. M.*

Morrow, of counsel, and *Smith & Smith*, attorneys, and oral argument by *Mr. Morrow*. They contended that only a question or point of law involving the merits of the case could be certified by the judge so as to permit an appeal. Ch. 215, Laws of 1895; *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210; *Geiser T. M. Co. v. Smith*, 36 id. 295. The appeal is from the judgment, and not from the order as to costs.

MARSHALL, J. Respondent claims that this court has no jurisdiction of the appeal, upon the ground that the judgment is not appealable. If such be the case it is because of the change made in the former law on the subject, under which an appeal from a judgment for costs only, was proper, by ch. 215, Laws of 1895, as amended by ch. 183, Laws of 1897, which provides that there shall be no appeal to the supreme court in any case involving, exclusive of costs, less than $100, except where the title to land is in question or the case necessarily involves the construction or interpretation of some provision of the constitution of the United States or of this state, unless the judge of the court where the judgment was rendered shall certify that such case necessarily involves the decision of some question or point of law of such doubt and difficulty as to require the decision of the supreme court. Manifestly, the only change thus made in the former statute on the subject of appeals, was that requiring a certificate of the trial judge in certain cases, submitting for decision only doubtful and difficult questions of law. A judgment for costs only was left appealable the same as before, subject to the requirement regarding the certificate and limiting the jurisdiction of the court to a consideration of doubtful and difficult questions of law stated therein. So the result is that we must hold that the court has jurisdiction of this appeal, though the only question of law involved pertains to who is entitled to costs.

The action is one on contract. That is a fact certified by the trial judge and rightly so, though, in any event, the statement to that effect in the certificate is binding for the purposes of this appeal. Subd. 6, sec. 2918, S. & B. Ann. Stats., plainly provides that plaintiff shall be entitled to *costs in any action on contract where the sum recovered by him shall be $100 or more.* So plaintiff here was not entitled to costs, because the sum recovered by him was too small, though this action is one mentioned in such section, within the meaning of sec. 2920, which provides that the defendant shall be entitled to costs in all actions mentioned in sec. 2918, where plaintiff is not entitled thereto, under such section. It follows necessarily that appellant is entitled to costs; that the trial court decided wrong on that point; and that the question submitted must be answered in the affirmative.

By the Court.— The question of law submitted by the trial court is answered in the affirmative, the judgment reversed so far as it denied costs to defendant, and the cause remanded with directions to allow costs to the defendant, and for further proceedings according to law.

BECKER, Respondent, vs. THE CITY OF LA CROSSE, Appellant.

99	414
111	38
99	414
40 LRA	829
44 LRA	477n
46 LRA	407n

April 13—May 3, 1898.

Municipal corporations: Rights and powers outside of state.

A city of this state has no power to accept a privilege, granted to it by the legislature of another state, of constructing a highway over territory belonging to such other state, subject to liability for all damages caused by the improper construction or want of repair of such highway, and therefore it cannot be held liable for an injury caused by defects in a highway so constructed, occurring outside the state.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

Ch. 37, Laws of 1889, authorizes the city of *La Crosse* to construct a bridge across the Mississippi river from some point in the corporate limits to some point in the county of Houston, in the state of Minnesota, opposite the city, with all necessary approaches thereto, and to charge and collect a reasonable rate of toll. By ch. 325 of the Special Laws of Minnesota for the year 1889, the city of *La Crosse* was authorized to construct and maintain a wagon road commencing at any point on a lawful highway in the said county of Houston north of the south line of the Pine Creek road, and extending thence, by the most feasible route, to the boundary line between Minnesota and Wisconsin, opposite the corporate limits of the city, and to charge a reasonable rate of toll for travelers thereon. By sec. 5 of said act it was also provided that the city should be liable for all damages sustained by any person traveling upon said road caused by the improper construction of said road or want of reasonable diligence in keeping the same in repair. The city accepted the provisions of the act, and built a road, with the necessary bridges, from a point within its corporate limits westward to a point in Minnesota, a distance of about two and one-half miles. The road runs across the Mississippi river bottom lands, and is built on a grade from eight to sixteen feet above the adjoining land. At the point where the accident to plaintiff is alleged to have occurred, which is about eighty-five feet west of the main bridge, the roadway is on a grade sixteen feet above the adjoining land, twenty feet wide on the top, with a descending slope of about one foot perpendicular to one and one-half feet horizontal and without any rail or guard at the sides.

On March 23, 1896, the plaintiff and her husband passed over this road from La Crescent to *La Crosse*, driving a single horse and buggy. Upon their return, the plaintiff

was driving, seated on the left side of the buggy. Near the place of the accident they met two teams loaded with what is known as "Minnesota fencing." The first team was passed in safety, but, as they met the second team, the horse shied at a man wearing a fur overcoat, walking immediately in the rear of the wagon, cramped the buggy suddenly, and backed off the embankment. In attempting to jump out, the plaintiff was caught in the buggy in some way, and was dragged down the embankment and injured. Notice was duly given to the city, and this action was commenced in the circuit court for La Crosse county, to recover damages for the injury sustained. The place of the accident is admitted to have been outside the corporate limits of the city, and within the boundaries of the state of Minnesota. The liability of the city is based upon the manner in which the road was constructed and maintained, there being no railing or barriers along the sides thereof.

The jury found a verdict for plaintiff for $1,000. From a judgment entered thereon, the defendant appeals.

For the appellant there was a brief by *Martin Bergh*, city attorney, and *Bleekman, Bloomingdale & Bergh*, of counsel, and oral argument by *F. H. Bloomingdale* and *Martin Bergh*.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*. They contended, *inter alia*, that for its negligence in respect to its corporate acts and the conduct of business from which it derives profit, such as gas works, waterworks, docks, ferries, and the like, a city is liable in the same manner as private persons or corporations. Dillon, Mun. Corp. (3d ed.), § 964; 15 Am. & Eng. Ency. of Law, 1141; *Mulcairns v. Janesville*, 67 Wis. 24; *Wilkins v. Rutland*, 25 Am. & Eng. Corp. Cas. 49; *Welsh v. Rutland*, 56 Vt. 228; *Hill v. Boston*, 122 Mass. 344; *Murphy v. Lowell*, 124 id. 564; *The Giovanni v. Philadelphia*, 59 Fed. Rep. 303; *Guthrie v. Philadelphia*, 73 id. 688.

Where it enters into private business it assumes all the responsibilities that attach to individuals in like circumstances. *Western S. F. Soc. v. Philadelphia*, 31 Pa. St. 175; *City Council of Augusta v. Hudson*, 88 Ga. 599; *The F. C. Latrobe*, 28 Fed. Rep. 378; *Sherlock v. Alling*, 93 U. S. 108.

BARDEEN, J. From the statement of the facts involved in this litigation, it will be observed that the accident to plaintiff happened on an embankment, some little distance west of the west end of the bridge across the Mississippi river, outside of the corporate limits of the city of *La Crosse*, and beyond the limits of this state; and it is insisted that the city of *La Crosse* built and maintained the road in question without any charter or legislative authority from the legislature of this state. It is not claimed that the charter gives the city any authority or power in the premises. The only power granted by the legislature is such as is contained in ch. 37, Laws of 1889. Dillon on Municipal Corporations (4th ed.), § 89, says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable." This declaration of the law meets with express approval in *Trester v. Sheboygan*, 87 Wis. 496. It is also a rule of law as universal in its application that the agents, officers, or even the city council, of a municipal corporation cannot bind the corporation by the assumption of powers beyond those granted by the sovereign authority, except within the limitations above stated. It would seem like a truism to state that the legislature cannot grant authority to a municipal corporation to assume obligations or to charge itself with permanent duties to be performed outside of the state limits.

Sec. 1, art. IX, Const. Wis., declares that "the state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to the state, or any other state or territory now or hereafter to be formed and to be bounded by the same." The boundary line between this state and Minnesota is the main channel of the Mississippi river. Const. art. II, sec. 1. In the exercise of its "concurrent jurisdiction" over the Mississippi river, this state saw fit, by ch. 37 before mentioned, to grant to the city of *La Crosse* the right to construct a bridge across the river to some point in Minnesota with all necessary approaches thereto. Admitting that this authority was properly conferred, for the purposes of this suit, the act referred to did not and could not grant the right to the city to build and maintain a highway two and one-half miles long, on the bottom lands of the river in the state of Minnesota. There is therefore nothing in the charter of the defendant city, or in ch. 37, giving it authority to keep up, or making it its duty to maintain, the highway upon which the plaintiff was injured.

The question, then, recurs, Had the city the authority or right to accept the privilege granted it by the state of Minnesota? We have been referred to no case, and after careful search we are unable to find one, in which this precise question has been determined. Such a decision may be in the books, but the industry of both counsel and court has been unavailing to find it. While it may be admitted that the maintenance of this bridge and highway may be of material advantage to the city and may add largely to the commerce of its inhabitants, it cannot be said to be of such paramount importance as to require any stretch of legal principles to sustain that right. It is true that municipal corporations are often granted proprietary or private rights, which they may exercise under the same perils and obligations as a private person; but those rights can only come

from the source that gave it corporate existence. By the acceptance and exercise of these rights, the corporation assumes the same obligations and responsibilities, and the same duty to so exercise them as not to invade the rights of others, as fall upon private persons. The distinction between the rights which the corporation possesses in its governmental or public character, and those which fall to it in its proprietary or private character, originated in the courts, to promote justice, and has been frequently applied to escape technical difficulties, in order to hold such corporations liable to private actions. 1 Dillon, Mun. Corp. § 67.

The general doctrine is clear that such corporations cannot usually exercise their powers beyond their own limits. The right to exercise extraterritorial powers can only arise by express grant of authority, as indicated in *Mayor v. Moran*, 44 Mich. 602, or by necessary implication from other powers granted, as is pointed out in *Coldwater v. Tucker*, 36 Mich. 474. And the powers so exercised must be directly within the range of corporate purposes. Considerations of local policy, no doubt, induced the legislature to grant the city of *La Crosse* the right to build the bridge mentioned. The movers in this enterprise evidently appreciated the serious difficulties attending the erection and management of expensive public works situated partly in this state and partly in Minnesota. It was to remove, in some degree, these difficulties, that the legislation referred to was obtained from the state of Minnesota. The corporation of *La Crosse* exists only by the grace of the legislative grant of this state. As before suggested, it possesses no power and can assume no obligations except such as may come from the original source. To permit it to accept rights, and to assume duties, beyond the power of its creator to enforce or to regulate, would be an innovation we are not prepared to sanction. From the very necessities of the situation, it would have no power to regulate or protect its erections in a foreign jurisdiction.

The noted case of *Bailey v. New York*, 3 Hill, 531, and *New York v. Bailey*, 2 Denio, 433, illustrates some of the complications that might arise in that regard. To permit the city, no matter how desirable it may be, to expend its money, and to obtain rights and privileges, beyond its own limits, and beyond the limits over which its creator has jurisdiction, would be unwise and dangerous, to say the least, and against public policy. Its acts in this regard being *ultra vires*, the municipality cannot be held liable therefor, or for failure to perform such acts, to the injury of others. Tiedeman, Mun. Corp. § 338. And see *Trester v. Sheboygan*, 87 Wis. 496; *Cavanagh v. Boston*, 139 Mass. 426.

In arriving at this conclusion, we have not overlooked the rule laid down in the celebrated case of *Bank of Augusta v. Earle*, 13 Pet. 519, to the effect that a corporation created by one sovereignty may, by comity, do business, hold property, and sue in the courts of other sovereignties of the Union, nor the line of decisions that hold that a city may take and hold the title to property outside of its corporate limits. In the first instance, the rule must be confined to trading or commercial corporations in contradistinction to municipal corporations; and, in the second line of cases referred to, the decisions are based upon the rule that the right to *own* property is not a sovereign right, and that the title to property may vest in the municipality even though it may not exercise the rights of sovereignty over it. *Lester v. Jackson*, 69 Miss. 887; *In re New York*, 99 N. Y. 569. And see *McDonogh's Ex'rs v. Murdoch*, 15 How. 367. We therefore hold that the city of *La Crosse* was without authority, under its charter or the law of this state, to accept privileges or assume duties and obligations to be performed outside of the limits and beyond the jurisdiction of this state, and, owing no duty to the plaintiff with reference to this highway, cannot be held liable in this action.

The cases of *The Giovanni v. Philadelphia*, 59 Fed. Rep.

303, and *Guthrie v. Philadelphia*, 73 Fed. Rep. 688, cited to support the plaintiff's recovery, are quite unlike the case at bar. We have no quarrel with the proposition that, when a municipal corporation engages in things not municipal in their nature, it acts as an individual, and is responsible accordingly. In each of these cases the corporation defendant engaged in the performance of duties strictly within its chartered powers, and the recovery against it was based entirely on that ground.

There is another feature of this case that raises a most serious question, should the liability of the city to keep up this highway be conceded. The road in question was twenty feet in width on the top, in perfect condition, and, so far as the evidence shows, with ample room for the accommodation of the public, in view of its use. The only imperfection in the highway is the alleged failure to erect and maintain guards or barriers along this embankment. The city is not an insurer of travelers on its streets. It is only required to keep its highways in a reasonably safe condition for travel. Here the way was broad and ample for the passage of teams, and it may reasonably be claimed, as a matter of law, that this highway met all the conditions required in such cases. That question, however, we leave for future determination.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

O'BRIEN, Respondent, vs. THE CITY OF LA CROSSE, Appellant.

99 421
103 330

April 13—May 3, 1898.

99 421
s40 LRA 881
46 LRA 158n
47 LRA 486n
52 LRA 328n
54 LRA 400

Practice: Physical examination of plaintiff in action for personal injuries: Discretion.

1. In an action for personal injuries the defendant has, in the absence of statute, no absolute right to have a personal examination of the injured party by physicians, but such right rests in the sound discretion of the court.

2. Where, in an action for an injury to the plaintiff's bladder, she, at defendant's request, submitted to a physical examination by defendant's experts to a certain extent, but refused to permit the introduction of a catheter on the ground that it might endanger her health, and her physician testified that he had objected because it might have that effect, *held*, that it was not an abuse of discretion to refuse to order such further examination.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

The facts appear in the opinion.

For the appellant there was a brief by *Martin Bergh*, city attorney, and oral argument by *Martin Bergh* and *F. H. Bloomingdale.* They contended, among other things, that the defendant in an action for personal injuries was entitled to a physical examination of the plaintiff in order to ascertain the exact nature of the injuries and how long they had existed. Trial courts might order and, in their sound discretion, compel such examination. *White v. Milwaukee City R. Co.* 61 Wis. 536; *Walsh v. Sayre*, 52 How. Pr. 334. The right of defendants to demand and of courts to compel such examinations is recognized in many cases. *Ala. G. S. R. Co. v. Hill*, 90 Ala. 71; *Schroeder v. C., R. I. & P. R. Co.* 47 Iowa, 375; *Devanbagh v. Devanbagh*, 5 Paige, 554; *Anonymous*, 89 Ala. 291, 7 L. R. A. 425; *McQuigan v. D., L. & W. R. Co.* 14 L. R. A. 466, note; *Trial of Sarah Baynton*, 15 How. St. Tr. 634; *Reg. v. Wycherley*, 8 C. & P. 262, note; 2 Bishop, Marriage & Div. § 590 *et seq.*, and cases cited; 1 Thompson, Trials, §§ 851, 859; *Hess v. L. S. & M. S. R. Co.* 7 Pa. Co. Ct. Rep. 565; *Sibley v. Smith*, 46 Ark. 275; *Railway Co. v. Dobbins*, 60 id. 481; *Miami & M. T. P. Co. v. Baily*, 37 Ohio St. 104; *Richmond & D. R. Co. v. Childress*, 82 Ga. 721; *Graves v. Battle Creek*, 95 Mich. 266, 270; *Langworthy v. Green*, id. 93; *Hatfield v. St. P. & D. R. Co.* 33 Minn. 130; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 10 Am. & Eng. R. Cas. 783; *Sidekum v. W., St. L. & P. R. Co.* 93 Mo. 400. See, also, 2 Jones, Ev. §§ 398, 399.

In some cases courts have refused the examination on the ground that the application therefor was not made at the proper time, or in a proper manner, or because of objections to the physicians who were proposed for the work; and not because they did not possess such power, and the right to exercise it in proper cases. *St. Louis Bridge Co. v. Miller*, 138 Ill. 465; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542; *Mo. Pac. R. Co. v. Johnson*, 72 Tex. 95; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*.

CASSODAY, C. J. This is an action for a personal injury sustained by reason of a plank in an alleged defective sidewalk suddenly flying up and striking plaintiff across the abdomen, and throwing her down and permanently injuring her bladder, or muscles connected with her bladder. Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff and assessed her damages at $500. From the judgment entered thereon the defendant brings this appeal.

There is plenty of evidence to support the verdict. The principal contention is that it was error for the court not to compel the plaintiff to submit to further examination by physicians on the part of the defendant, to ascertain the exact nature of her injuries, and how long they had existed. When the first medical witness on behalf of the plaintiff was sworn, the defendant asked that, before he should be examined, the defendant's experts should be allowed to make a personal examination of such injuries. It was then agreed, without any objection being made, that an arrangement would be made for such examination after the evening adjournment of the court. It appears that a full and complete examination was had by the defendant's physicians before the opening of the court the next morning, except that the

plaintiff, under the advice of her physicians, refused to permit the introduction of a catheter into her bladder, for the reason that it would endanger her health.

After the defense had sworn and examined four witnesses, the defendant asked for an order compelling the plaintiff to submit to an examination by instruments, to determine the condition of her bladder. A statement having been made as to the examination which had in fact been made, the court stated that, while the court had power to order an examination, it had no power to determine the extent of such examination. No exception was made to such ruling. The defendant's physicians testified to the effect that their object was to withdraw all the urine from the bladder; that, in a healthy bladder, it was safe to do so; that there were conditions of the bladder where it was absolutely dangerous to withdraw all the urine therefrom at one time, and by so doing the walls of the bladder were certain to come together and excite inflammation; that a coming in contact with the urine in the bladder would produce decomposition, and the decomposition had the effect of producing *cystitis*, a cause that was very frequent. The plaintiff's physician testified to the effect that he objected to the introduction of a catheter because he did not consider it prudent; that *cystitis* (inflammation of the bladder) was liable to follow. After the defendant rested its case, and the plaintiff's rebutting testimony had been put in, the defendant renewed its motion for an order that the plaintiff be compelled to submit to such further examination, which request was denied by the court, and the defendant excepted; and this is the only exception in the record on that subject.

Was such refusal error? This court has held that "in an action for personal injuries, the court may, in a proper case, at the trial, direct the plaintiff to submit to a personal examination by physicians on behalf of the defendant." *White v. Milwaukee City R. Co.* 61 Wis. 537. It seems that courts

differ widely as to the absolute right to such personal examination, in the absence of statute, by physicians or experts of the opposite party. Some courts deny the right altogether. Some hold that an absolute right to such examination exists at common law. Such differences of opinions may be accounted for in part by the difference in the circumstances under which such examinations were requested. The better opinion, in our judgment, makes the right, in the absence of statute, to rest in the sound discretion of the trial court. *Ala. G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L. R. A. 442; *Shepard v. M. P. R. Co.* 85 Mo. 629; *Sidekum v. W., St. L. & P. R. Co.* 93 Mo. 400; *Owens v. K. C., St. J. & C. B. R. Co.* 95 Mo. 169; *Railway Co. v. Dobbins*, 60 Ark. 485, 486; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719; *Graves v. Battle Creek*, 95 Mich. 266; *Strudgeon v. Sand Beach*, 107 Mich. 496; *Hatfield v. St. P. & D. R. Co.* 33 Minn. 130; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542; *Chadron v. Glover*, 43 Neb. 733. In some of these cases the application was refused because not made in time to avoid the interruption of the ordinary course of the trial.

In the case at bar there was no abuse of discretion. On the contrary, it would have been an abuse of discretion to force the plaintiff to submit to such an experiment with instruments, under the circumstances stated.

There is no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

99 426
114 367

DARLING and others, Respondents, vs. NEUMEISTER, imp., Appellant.

April 13 — May 3, 1898.

Mechanic's lien: Homestead: Practice as to findings.

1. In an action to enforce the mechanic's lien given by sec. 3314. R. S. 1878, upon forty acres of land according to government subdivision, on account of buildings erected on the south part thereof, the defendant cannot claim that, because his dwelling and buildings constituting his homestead are situated on the north part of said forty-acre tract, the court shall carve out a forty acres different from the government subdivision, composed in part of the land on which the buildings are situated, to be subject to the lien.
2. A party who desires a particular finding to be made by the court should call its attention thereto, and if he fails to do so and the findings actually made are correct and no different ones are required by law, he can take no advantage of the neglect of the court to make such finding.

APPEAL from a judgment of the circuit court for La Crosse county· O. B. WYMAN, Circuit Judge. *Affirmed.*

This is an action to foreclose mechanics' liens upon forty acres of land outside of the city limits of the city of La Crosse. The facts were that the defendant *Neumeister* owned the forty acres of land in question in 1894, being the S. W. ¼ of the N W. ¼ of section 15, his dwelling house and barn being in the north part of the forty. He also owned two forties of land immediately south of the forty in question, being the N. W. ¼ of the S. W. ¼ and the S. W. ¼ of the S. W. ¼. In 1894 he built a race track, with the necessary grand stand and stalls for horses, upon these three forties. The principal part of the track and buildings lay upon the N. W. ¼ of the S. W. ¼, or the middle forty, but a part of the track extended over into the S. W. ¼ of the N. W. ¼ (being the forty upon which a lien is claimed in this action), and 133 of the stalls for horses were built upon this last-named forty. These stalls were in a continuous line of sheds, and the line ran

over onto the middle forty, where there were twelve more stalls, making 145 in all, but they were built under a contract for a certain sum for each stall. That part of the race track and stalls which extends over onto the S. W. ¼ of the N. W. ¼, which is the north forty, covers the south 22.74 acres of said forty. The liens in question here are liens claimed upon the last-named forty for the building of the 133 stalls aforesaid. The defendant's only contention is that he had selected the north 17.26 acres of this forty, with other adjoining lands owned by him, as his homestead, and that the court should have carved out a forty-acre tract of land to be subjected to the liens, including the south 22.74 acres only of the S. W. ¼ of the N. W. ¼, and should not have subjected the north 17.26 acres to the liens, because it was a part of his homestead, or at least should have ordered the south 22.74 acres to be first sold. No findings to this effect were requested before judgment. The court found the amount of the various lien claims, together with the other necessary findings in lien actions, and found that the stalls were built upon the S. W. ¼ of the N. W ¼ aforesaid, and rendered the usual judgment of lien upon the whole forty, and the defendant *Neumeister* appealed.

For the appellant there was a brief by *Bleekman, Bloomingdale & Bergh*, and oral argument by *A. E. Bleekman* and *F. H. Bloomingdale*. They argued that the defendant's homestead should have been excepted from the lien. It is not subject to a lien, as here claimed, for materials furnished. S. & B. Ann. Stats. sec. 2983. The statute does not confine liens to government subdivisions.

For the respondents there was a brief by *Higbee & Bunge*, attorneys, and *Losey & Woodward*, of counsel, and oral argument by *E. C. Higbee*.

WINSLOW, J. We discover no ground for reversal in this case. A homestead is distinctly made subject to sale for mechanics' liens thereon by the statute (R. S. 1878, sec. 2983).

A mechanic's lien is given upon forty acres of land upon which the building is built or work done if not within a city or incorporated village. R. S. 1878, sec. 3314. The buildings on account of which these liens were claimed were admitted to have been built upon the identical forty acres upon which the court adjudged a lien. Therefore the judgment seems to be strictly within the statute. The claim for lien must specifically describe the land affected thereby (R. S. 1878, sec. 3320); and it is difficult to see how the plaintiff's right to a lien can be cut down by the court when he has simply claimed a lien upon forty acres of land upon which the buildings are located. Even if the court could, upon equitable considerations, order the north part of the forty containing the defendant's house and barns to be sold last, or exempt it from sale entirely, and carve out another forty acres, not according to government subdivisions, but composed of the south 22.74 acres of the forty in question, and the north 17.26 of the adjoining forty on the south, there are no such considerations in this case. On the contrary, the evidence shows that the middle forty is heavily incumbered with mortgages, which are prior liens, and the probability is that the lien claimants could realize little or nothing from its sale.

Moreover, the defendant never requested findings as to the homestead until after judgment had been signed, and then filed a paper containing exceptions to certain findings and requests to find as to the alleged homestead. These requests seem never to have been brought to the attention of the court. The rule is well settled that, if a particular finding is desired, the party must call the attention of the court to the fact on which he desires a finding; and if he does not, and the findings actually made are correct, and no different findings are required as matter of law, then no advantage can be taken of the neglect of the court. *Wetzler v. Duffy*, 78 Wis. 170.

By the Court.—Judgment affirmed.

JONES and others, Appellants, vs. RICE and others, Respondents.

April 13 — May 3, 1898.

Deed: Evidence of mental capacity to execute.

In an action to set aside a deed executed by a person since deceased, on the ground that he was mentally incompetent when he executed it, the testimony of intelligent and disinterested witnesses, who had known him for a long time, that he seemed intelligent and reasonable at that time, and that they noticed nothing wrong with him, *held* sufficient to sustain a finding that he was mentally competent at the time he executed the deed, notwithstanding there was evidence that the year before its execution, having become despondent from business reverses, he attempted suicide, and that subsequent to his wife's death, six years thereafter, he appeared deranged and was committed to an insane asylum, where he died.

APPEAL from a judgment of the circuit court for Trempealeau county: O. B. WYMAN, Circuit Judge. *Affirmed.*

The complaint in this action alleges that on the 19th day of January, 1881, and for a long time subsequent thereto, and until the time of his death, one John Rice was the owner in fee simple of 160 acres of land described therein, and that he died intestate on the 26th of January, 1895, leaving *Rowena E. Jones*, *Mary E. Jones*, *Delilah Jones*, *Martha A. Ensign*, and *Sarah J. Lampman* his heirs at law; that W. C. Rice died intestate April 14, 1892; that *Eugenia C. Rice* is his widow, and the defendants *Ada M. Rice*, *Lulu R. Rice*, and *Newell Rice* are his children and sole heirs at law. It alleges the administration of the estate of said W. C. Rice in the county court of Trempealeau county. It is further alleged that on January 20, 1881, and for a long time prior thereto, and at all the times thereafter until the time of his death, said John Rice was insane, incompetent, and unfit to carry on his business, or to take charge of his affairs or

property, and was unable, because of such insanity, to understand the nature and effect of a deed, and incompetent to understand or make any contract of any kind or description; that on January 20, 1881, and for a long time prior and subsequent thereto, said John Rice lived in the same house with the said W. C. Rice, and was at all times under his influence and subject to his control; and that on said 20th day of January, 1881, said W. C. Rice, well knowing that said John Rice was insane and incapable of entering into a contract, and for the purpose of defrauding and cheating said John Rice out of his property described in said complaint, wrongfully and fraudulently induced him, while so insane, to execute and deliver to him (said W. C. Rice) a certain instrument, purporting to be, and which was in form, a warranty deed, conveying the land thereinbefore described from said John Rice to said W. C. Rice. Judgment was prayed that the deed in said complaint mentioned, made by said John Rice to said W. C. Rice, be declared wholly void and of no effect. Another cause of action was embraced in the complaint, but by amendment before the trial it was abandoned and stricken out.

The defendants, by their amended answer, denied each and every allegation of the plaintiffs' complaint, except as expressly admitted or specifically set forth, and admitted that on the 19th of January, 1881, and for a long time prior thereto, John Rice was the owner of the N. E. ¼ of section 23, town 24, range 9 W., but denied that the said John Rice was the owner of said lands, or any part thereof, after January 19, 1881. They admitted that said John Rice died intestate December 25, 1894, and left surviving him, as his heirs at law, *Rowena E. Jones*, *Delilah Jones*, *Mary E. Jones*, *Martha A. Ensign*, and *Sarah J. Lampman;* that W. C. Rice died intestate April 14, 1892, leaving his widow, *Eugenia C. Rice*, and, as his heirs at law, three minor children, defendants in this action, to wit, *Ada M. Rice*, *Lulu R. Rice*, and

Newell Rice. And it was alleged that on the 19th day of January, 1881, said John Rice and Cynthia Rice, his wife, for a valuable consideration, executed and delivered to said W. C. Rice a good and sufficient deed of conveyance, wherein and whereby they sold and conveyed to said W. C. Rice said N. E. ¼ of said section 23, town 24, range 9, mentioned in the plaintiffs' complaint, and that W. C. Rice then and thereby became the owner thereof in fee simple, and so remained up to the time of his death.

For a further defense the defendants alleged that the plaintiffs are estopped and ought not to be allowed to say that the deed executed and delivered by the said John Rice and wife to W. C. Rice, January 19, 1881, was obtained by fraud on the part of W. C. Rice, or that it was without consideration, or that said John Rice was insane at the time of executing said deed, because they say, upon information and belief, that the plaintiffs herein, and each of them, had full knowledge of all the facts and circumstances concerning said transaction, and took part and assisted in the execution and delivery of said deed, and had never, until the commencement of this action, taken any step to have said conveyance set aside; that the actual consideration for said deed of January 19, 1881, was that the said W. C. Rice, grantee therein, was to assume and pay a certain real-estate mortgage of $800 upon the land conveyed by said deed, and that he was to assume and pay the outstanding indebtedness of the said John Rice, grantor therein, and to support the said John Rice and wife, Cynthia, during the lifetime of each, and upon their death was to pay their burial expenses; that the said W. C. Rice, and his heirs and assigns, had performed each and every obligation on their part to be performed as the consideration for said deed of conveyance; and that the said John Rice, his heirs and assigns, received, accepted, and ever since had retained, said consideration, and the plaintiffs herein, and each of them, had at all times since

the execution of said deed, both by words and conduct, recognized the validity thereof, and insisted upon the full payment of the consideration therefor by the said William C. Rice and his heirs to the said John Rice and his heirs. Wherefore they demanded judgment that the complaint be dismissed.

At the close of the evidence the court found that on the 19th day of January, 1881, John Rice was the owner in fee simple of the quarter section of land in question, and that William C. Rice was his son, and that the latter died April 14, 1892, leaving his widow, *Eugenia C. Rice*, and three minor children, namely, *Ada M. Rice*, *Lulu R. Rice*, and *Newell Rice*, the defendants in this action, and that said John Rice died December 25, 1894, and left surviving him, as his heirs at law, five daughters, being the plaintiffs in this action, and the widow and children of his deceased son, William C. Rice, above named; that on the 19th of January, 1881, said John Rice and Cynthia Rice, his wife, sold said lands to William C. Rice, and executed and delivered to him a warranty deed thereof, and that they were then of the reasonable value of $2,000, and incumbered by a mortgage of $800 given by John Rice, and as payment for said lands said William C. Rice assumed and agreed to pay said mortgage, and to pay the debts of John Rice, and to support him and his wife, Cynthia, during the remainder of their lives; that William C. Rice went into the actual possession of said lands under said deed, and continued to occupy and control the same during his lifetime, and that since his death his said widow and three children had lived upon and occupied said lands as the heirs at law of said grantee; that at the time of the execution of the said deed the plaintiffs were each over twenty-one years of age, and married, except the plaintiff *Rowena Jones*, who was twenty years of age and unmarried; that the said William C. Rice was then twenty-nine years of age, and up to that date had always

lived at home with his parents; that the deed in question was signed by Cynthia Rice, wife of John Rice, and that she was then a strong, healthy woman, and fully understood the nature of the contract, and that the plaintiff *Rowena Jones* signed said deed as a witness, and that none of the parties interested objected to said conveyance after they knew of its execution; that said William C. Rice assumed and paid said mortgage, and paid the debts of said John Rice, and supported and maintained said Cynthia Rice to the time of her death, which occurred about September 3, 1887, and supported and maintained the said John Rice to the time of his death, except what aid he received in the asylum; that said John Rice was of a retiring disposition, and at times despondent, and on or about the 9th day of October, 1880, he attempted to commit suicide; that after the death of his said wife, Cynthia, the said John Rice appeared to be deranged, and about the month of November, 1887, was committed to the asylum for the insane, where he remained until the time of his death; that although the said John Rice was at times despondent, yet at the time he sold said lands and executed the deed in question to William C. Rice he was sane and mentally competent, and that he had the mental ability to exercise reasonable judgment in regard to the matter, and he knew and fully comprehended the nature and effect of the transaction; that no fraud, duress, or undue influence was practiced by said William C. Rice, nor by any one for him, to procure the execution of said deed, but that in the sale of said lands and in the execution of said deed the said John Rice acted understandingly, and of his own free will.

As conclusions of law, it was found that the deed in question was a valid conveyance of said lands from John Rice to William C. Rice, and that the defendants were entitled to judgment against the plaintiffs for their costs and disburse-

ments in the action; and judgment was rendered thereon in favor of the defendants, and for costs.

In the brief for appellants, it is stated that the principal point on which they rely to reverse the judgment is that the findings of the circuit court are not sustained by the evidence; and this is followed by the further statement that there is but one question of fact that is really disputed, and that is whether or not John Rice at the time he executed the deed in question was in a condition of mind so that he could execute a valid conveyance. It was conceded that there was no substantial dispute in regard to any of the other facts in the case.

For the appellants there was a brief by *E. B. & R. E. Bundy*, and oral argument by *E. B. Bundy*. They argued, among other things, that there was evidence of facts sufficient to throw upon the defendants the burden of showing that the transaction was fair, which they had failed to do. When an old, infirm, and sick man gives all that he has to one of his children, disinheriting the rest, the one getting the property should not complain if called upon to show how and why it was so done. *Davis v. Dean*, 66 Wis. 100; 27 Am. & Eng. Ency. of Law, 489; *Giles v. Hodge*, 74 Wis. 360.

For the respondents there was a brief by *C. W. Gilman* and *S. G. Gilman*, and oral argument by *S. G. Gilman*.

PINNEY, J. The only question presented on this appeal is the single disputed question of fact, whether at the time of the execution and delivery of the deed of the premises in dispute by John Rice and wife to his son, William C. Rice, on or about January 19, 1881, said John Rice was sane and mentally competent to execute and deliver the same. The plaintiffs alleged in their complaint that at the time the said John Rice was insane, and incompetent to make any contract, or to understand the nature and effect of a deed, and

incompetent and unable, by reason of want of competent understanding, to enter into or make a contract of any kind or description whatever, and that upon the death of said John Rice, intestate, January 26, 1895, the premises described in said deed descended to the plaintiffs, as his heirs at law. The action was commenced September 7, 1896. Whether John Rice was competent to execute and deliver the deed in question at the time named was a point to which very considerable evidence was directed, which upon examination falls far short of showing that at the time in question he was incompetent to execute and deliver the deed of the lands in dispute to his son, W. C. Rice, or that he was then insane, or incompetent to make and execute a valid deed of conveyance of real estate. The trial judge heard the evidence of the witnesses examined on this question, and had the means of arriving at a correct judgment thereon, which we do not possess. There is evidence, which the trial judge seems to have regarded as entirely credible and satisfactory, to show, not only the mental competency of John Rice, but that the deed was made with due deliberation, and for an adequate consideration paid and agreed to be paid by W. C. Rice, and received and enjoyed by John Rice in his lifetime, and that no objection or question was made by him in his lifetime in respect thereto, or by his heirs since his death, until about the time this action was commenced. In view of the evidence contained in the record, and the facts found by the trial court upon what appears to be sufficient evidence, we feel compelled to hold that the plaintiffs have failed to make out a case entitling them to any relief.

The burden of proof was on the plaintiffs, and we think, from an examination of the evidence, that the plaintiffs failed to satisfactorily establish the ground upon which they based their claim to relief. Witnesses, apparently intelligent and disinterested, who had known John Rice for a long time, tes-

tified that he seemed intelligent and reasonable, and that they did not notice anything wrong with him mentally. The evidence tends to show that he had been unsuccessful in business transactions, and had failed to account for and pay over the moneys he had received as town treasurer of the town in which he resided. In general, the evidence is to the effect that he had been unfortunate in business affairs, and had become quite despondent, and that October 9, 1880, he attempted to commit suicide; that his wife died about September 3, 1887, and thereafter he appeared to be deranged, and subsequently, in the month of November in that year, he was committed to the asylum for the insane, where he remained until the time of his death, which occurred December 25, 1894. The fact that John Rice worried over the unfortunate condition of his affairs, and that he attempted to commit suicide, as against the evidence in the record, is wholly insufficient to show that at the time he executed and delivered the deed to his son, W. C. Rice, he was insane, or mentally incompetent to execute and deliver said deed. Various matters were given in evidence, having a bearing on that question more or less direct or remote; but it is not material to extend this opinion by a lengthy statement or review of the evidence, which cannot, in any view of it, serve any useful purpose.

We think that the trial court arrived at a correct conclusion on the question, and this conclusion requires the affirmance of the judgment of the circuit court.

By the Court.— The judgment of the circuit court is affirmed.

SIEBRECHT, Respondent, vs. HOGAN, imp., Appellant.

99 437
102 289
99 437
108 376
d108 378

April 13 — May 3, 1898.

Mechanic's lien: Lien of subcontractor: Jury trial: Special verdict: Burden of proof.

1. The statutory right to a jury trial in an action to enforce a mechanic's or materialman's lien, under sec. 3323, R. S. 1878, is conditional upon a demand being made therefor at or before the time of the commencement of the trial, specifying the particular issue or issues of fact upon which a verdict is required; a failure to make such demand constitutes a waiver of the statutory right. A subsequent submission of issues on the request of either party, against the objection of the other, the same as if the demand, with proper specification of the issues, was made at the proper time, is reversible error.
2. A subcontractor's lien cannot, to the prejudice of the proprietor, be extended so as to cover for work not included in the principal contract as originally drawn or subsequently modified, or to damages for mistakes or negligence of the principal contractor, or breaches of contract on his part.
3. The subcontractor's authority to bind the proprietor's property is referable always to the principal contract. To that extent, but no further, the proprietor is deemed, by force of the statute, to authorize the principal contractor to bind such proprietor's property under the lien laws. That authority does not extend to any claim that is not lienable between the principal contractor and the proprietor.
4. Where a special verdict is required, if any instructions are given as to where the burden of proof rests, the jury should be so informed that they will understand the subject as to each material fact in issue. A general instruction that the burden of proof is where the weight is, and that the general rule that the burden of proof is on the plaintiff does not apply, *held* to be error.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

Action to enforce a subcontractor's lien under ch. 143, R. S. 1878, and ch. 312, Laws of 1885, and the acts amend-

atory thereof. The complaint is in the usual form. It sets forth in substance, among other things, that defendant Gross was the principal contractor and defendant *Hogan* the proprietor; that the contract covered the construction of a store building and spice mill on lands described; that plaintiff, as subcontractor, furnished work, labor, and material in the construction of such store building to the amount of $2,840, and such spice mill to the amount of $600, and additional work, labor, and material, outside of the subcontract, to the amount of $702.59 in the construction of both buildings. The balance claimed to be due was $1,367.29. Defendant *Hogan* answered, among other things, by admitting that he was the proprietor and Gross the principal contractor; that plaintiff, as subcontractor under Gross, furnished work, labor, and material in the construction of the store building to the amount of $2,500, and of the spice mill to the amount of $500, at the contract price, and furnished other work, labor, and material in such construction to the amount of $161.28, as settled and agreed upon between the parties. The answer further alleged that, before the commencement of the action, all the transactions between plaintiff and Gross were settled and the amount due agreed upon at $574.73, and that $444.82 was paid to plaintiff after such settlement.

At the commencement of the trial a jury was impaneled, but there was no demand by either party, at that time, for the submission of any specific issue or issues to be decided by such jury. At the close of the evidence, defendant's attorneys objected to the submission of any question to the jury under the statute making the verdict conclusive, because no demand was made therefor at the commencement of the trial. The court decided to allow plaintiff's request for a jury trial the same as if a demand were made therefor at the proper time. Thereupon plaintiff's counsel submitted questions, and defendant's counsel suggested others, where-

upon the court prepared a form for a special verdict, covering the suggestions of both sides. The jury determined the issues covered by such special questions, as follows:

(1) The contract price for the main building was $2,500, and for the spice mill $500.

(2) Plaintiff performed extra work and labor for Gross to the value of $600.

(3) Plaintiff and Gross did not settle their accounts and agree upon $574.73 as the balance due plaintiff.

(4) Defendant Gross paid plaintiff upon account of the buildings, prior to the commencement of this action, $2,775.30, and afterwards $371.21, excluding Fuller amount.

(5) Plaintiff performed extra work in removing brick and mortar of the old wall, to the amount of $150; and in removing frozen earth in excavating the cellar, to the amount of $220; also in changing concrete in the basement to the value of $61.

The court filed findings and conclusions of law, adopting the findings of the jury so far as they covered the case. Judgment was entered accordingly in plaintiff's favor, from which defendant *Hogan* appealed, assigning errors on exceptions to the judge's charge to the jury, on the submission of questions to the jury, on the admission of evidence as to damages caused to plaintiff by the negligence of defendant Gross, and breaches of contract on his part, and as to extra work outside of the contract between *Hogan* and Gross; also errors on exceptions to the findings of the trial court covering the same subject.

For the appellant there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee.*

For the respondent there was a brief by *Bleekman, Bloomingdale & Bergh*, and oral argument by *F. H. Bloomingdale* and *Martin Bergh.* They argued, *inter alia*, that there was no positive rule of statute or practice as to when the issues to be submitted to the jury should be framed. The practice

of submitting them at the close of the testimony seems to have been usually adopted by the courts of this state. *Moritz v. Larsen*, 70 Wis. 569; *Bentley v. Davidson*, 74 id. 420; *Stiles v. Neillsville M. Co.* 87 id. 266; *Conover v. Knight*, 91 id. 569. As a matter of fact, all the questions of fact which either party wished to have tried by jury were so tried, and, even though it might have been better practice, the failure to submit the issues at the commencement of the trial was a mere irregularity, which should be disregarded on appeal. S. & B. Ann. Stats. sec. 2829; *Soenksen v. Weyhausen*, 32 Wis. 521; *Cameron v. White*, 74 id. 425, 427. The items of plaintiff's claim objected to were for work for which he is entitled to compensation, and to a lien under sec. 3315, S. & B. Ann. Stats. *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170.

MARSHALL, J. The errors assigned and argued on this appeal, that require special mention, may be stated as, (1) granting plaintiff's request to submit issues to the jury, though such request was not made till the close of the evidence; (2) allowing a subcontractor's lien for damages caused by the principal contractor's negligence and breaches of contract, and for extra work not authorized by the principal contract; (3) erroneous instructions in regard to the burden of proof. Such alleged errors will be considered in their order.

1. Actions to enforce mechanics' and materialmen's liens, under the law of this state as it existed at the time of the trial, are suits in equity, with the added feature, under sec. 3323, R. S. 1878, giving to either party, on demand therefor, the right to have any issue of fact involved submitted to a jury, whose verdict shall be conclusive. That section clearly contemplates that the demand for a jury shall be made before the commencement of the trial and that it shall specify the particular issue or issues to be submitted, to the end that proper questions, in the form of a special verdict,

may be drawn accordingly. Compliance with that requirement was a condition precedent to the right to a verdict of a jury, as in an action at law. *Charles Baumbach Co. v. Laube*, *ante*, p. 171. It follows that when plaintiff requested the submission of issues to the jury in this case, it was too late; he was not entitled thereto, and the court had no power to grant it against defendant's objection.

2. There were some exceptions to rulings on objections to evidence, to instructions to the jury, and to findings and conclusions filed by the trial judge, all of which turn on whether a subcontractor is entitled to recover for work, labor, and material not authorized by the principal contract, or for damages suffered by the subcontractor through the negligence and breaches of contract of the principal contractor. The trial court proceeded on the theory that the right of the subcontractor to a lien included charges for all work, labor, and material furnished to the principal contractor, without regard to the principal contract, and all damages to such subcontractor by reason of negligence of the principal contractor or breach of contract on his part. In regard to the questions covering extra work, the court instructed the jury, in effect, that it included all work done by plaintiff for defendant Gross outside of their contract, without regard to the contract between Gross and *Hogan*. Sec. 3315, R. S. 1878, as amended, upon which the right to the lien is based, provides that every person who, as subcontractor of a principal contractor, or employee of any contractor or subcontractor, performs any work or labor for, or furnishes any material to, a subcontractor, in or about the erection, construction, repair, or protection of any dwelling house or other building, shall be entitled to a lien thereon by complying with the provisions of such section. Manifestly, such right of lien is confined to work, labor, and material required by the principal contract. To that extent, by force of the statute, the owner makes the principal con-

tractor his agent to bind his property, but no further. The subcontractor's right, at every point, is referable to the principal contract as originally made or subsequently modified. That forms the basis for all operations, hence, as to everything outside of it, for which the principal contractor would not be entitled to a lien against the owner, the subcontractor cannot acquire a lien to the prejudice of such owner, whatever his rights may be against the principal contractor personally. That is the clear intent of the statute. The whole theory of it is that the owner consents to what is required to carry out the principal contract, and makes his property liable therefor in accordance with the statue, which is made a part of the contract, the same as if actually embodied in it. But if the subcontractor, by mistakes, increases the cost of the building to him, or by reason of negligence or breaches of contract with a subcontractor in the second degree, increases such cost, that cannot be said to have been contemplated by the owner and consented to by him, hence his property cannot be charged therewith to his prejudice, for it is only work, labor, and material furnished by the subcontractor, required by the principal contract, that constitute lienable claims in favor of such subcontractor, under the statute.

We do not feel called upon to cite authorities to support this construction of the statute, because its meaning in that regard is considered to be without reasonable question; but see Jones, Liens, § 1300; *Tabor v. Armstrong*, 9 Colo. 285.

It follows from what has preceded that, whether the alleged extra work and material were included in the original contract between plaintiff and Gross, was not the sole test of whether the same was allowable as against the appellant, *Hogan*. There was the further test of whether the claim therefor was lienable according to the contract between *Hogan* and Gross, either originally or as subsequently modified. That many of the items of such extra work and ma-

terial were not so lienable is evident, and as to whether other items were authorized by *Hogan*, under the terms of the principal contract, so as to be binding upon him, the proof is by no means satisfactory.

A subcontractor cannot make any agreement or incur any liability, not authorized by the principal contract, to the prejudice of the owner. *McCrary Bros. v. Bristol B. & T. Co.* 97 Tenn. 469. The contract between *Hogan* and Gross provided specifically for the manner of ordering extras as between them. Gross could not order any so as to bind appellant's property, other than by following such contract, unless the provisions in that regard were waived by appellant. The case on this subject does not appear to be covered by the evidence. So we are unable to determine the facts in accordance with the law as here laid down, and direct the proper judgment to be entered.

The $220 found by the jury for extra work in removing frozen dirt from the cellar, made necessary by the breach of contract or negligence of Gross, the $10 included, as appears from the evidence, for rebuilding a wall made necessary by the negligence of plumbers, the $15 for recutting jambs, and some other items caused by the negligence or mistakes of Gross or those employed by him, were clearly not proper charges against the appellant's property. It appears from the evidence that the principal contract required Gross to remove a brick wall which was located on the premises; that he tipped such wall into the excavation plaintiff was making for the cellar, and that plaintiff then removed the débris. Whatever was the reasonable cost of removing the wall, as contemplated by the principal contract, may be properly considered as included in the charge made for removing the material of which the wall was composed after it was thrown by Gross into the excavation, but the balance of the plaintiff's claim for removing such material cannot be considered as any part of the work contracted for by the

appellant, and the same is therefore not chargeable to his property to his prejudice.

On a new trial the court can readily determine the facts with proper regard to the legal principles involved, and it is considered best to award a new trial for that purpose. All charges for damages for negligence on the part of the contractor Gross, or to remedy his mistakes and the mistakes or negligence of his employees, and all work, labor, and material not authorized by the contract between him and the appellant, as originally drawn or thereafter modified, all charges for work done for any other contractor than Gross, must be excluded from the amount chargeable to appellant's property in this action.

3. The charge of the learned court on the subject of the burden of proof is subject to some criticism. He said: "It is difficult to determine what the law is in regard to the burden of proof. The burden of proof is where the weight is. The general instruction concerning the burden of proof, that it is upon the plaintiff, is not applicable to this case." It needs no discussion to show the prejudicial and misleading character of such language. The burden of proof is not synonymous with the weight of evidence. It is always on the party plaintiff affirming the existence of a fact in issue, where that fact is essential to his recovery. The weight of evidence may be in favor of one side of a controversy and the burden of proof on the other. If the true meaning of the learned court is that the general instruction ordinarily given, that the burden of proof is on the plaintiff, is not necessarily applicable where a special verdict is submitted, he was right, but we are unable to say that the jury so understood the court's instruction. No other instruction was given on the subject, and the jury may have understood that the burden of proof was not on the plaintiff to establish the existence of the facts in issue covered by the special verdict, which were essential to his right to recover. What

the court should have done, if anything, by way of instructing the jury on the subject under discussion, was to instruct them as to which side the burden of proof lay as to each of the issues covered by the special questions.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

WEYERHAEUSER, Respondent, vs. EARLEY, Administrator, Appellant.

April 14—May 3, 1898.

Appeal, what will be reviewed: Briefs.

1. The supreme court will not review the finding of a trial court, unless the evidence upon which it is based has been incorporated in the bill of exceptions.
2. Failure of the brief of the appellant to contain, among other things, a concise statement of "the errors relied upon for reversal," as required by Supreme Court Rule IX, criticised, and the importance of such requirement emphasized.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee.*

For the respondent there was a brief by *Bleekman, Bloomingdale & Bergh*, and oral argument by *F. H. Bloomingdale.*

BARDEEN, J. The bill of exceptions in this case consists of a mere statement that, "within ten days after the making and filing of the findings of fact and conclusions of law, the defendant duly excepted to the seventeenth finding of fact, by serving a copy of such exception upon the attorneys for the plaintiff, and filing the same, in writing, with the clerk

of this court." No evidence is preserved in the bill, and we are thus left powerless to review any question of fact arising in the case. The rule has frequently been emphasized that this court will not review the finding of a trial court unless the evidence upon which it is based has been incorporated in the bill of exceptions. With no evidence before us, the only question to be determined is whether the judgment is sustained by the pleadings and findings. *Wis. River Imp. Co. v. Lyons*, 30 Wis. 61; *Thomas v. Mitchell*, 27 Wis. 414. We find no difficulty in answering that question in the affirmative.

Counsel have neglected to comply with Rule IX of this court, which requires the brief of appellant to contain, among other things, *a concise statement of "the errors relied upon for reversal."* We desire to emphasize this requirement. It is of material assistance to the court. It directs immediate attention to the main points involved in the case, and enables the court to grasp the real issues involved at the outset. Appellant's brief is an apt illustration of the desirability of close adherence to this rule. At the beginning of their argument, counsel state several propositions of law, and discuss a number of authorities, without any suggestion as to their applicability to the case, until we get well towards the end of the brief. Possibly this arrangement of propositions may be an inducement for the court to read the briefs to the end, but in this case we acquit counsel of any such sinister design. We only desire to criticise their failure to comply with the rule, and regret our inability, from the state of the record, to consider the legal questions they have so ably discussed.

As before stated, we cannot review the findings, because no evidence has been preserved. The findings being accepted as a verity, the conclusion follows that plaintiff was entitled to judgment upon the record presented.

By the Court.— The judgment of the circuit court is affirmed.

FOSTER, Respondent, vs. THE FIDELITY & CASUALTY COMPANY OF NEW YORK, Appellant.

99 447
103 434
99 447
40 LRA 833
46 LRA 682n
49 LRA 760n

April 14 — May 3, 1898.

Accident insurance: Notice of accident: Proof of death: Pleading: Waiver: Evidence: Appeal.

1. The requirement of an accident insurance policy that *immediate* notice shall be given of "any accident and injury for which a claim is to be made," applies as well to the case of an accident resulting in death as to one resulting only in disablement.
2. "Immediate" in such requirement means within such convenient time as may be reasonably necessary under the circumstances. Where the alleged accident occurred August 31, the death occurred September 5, and the beneficiary had satisfied herself of the facts as early as September 17, a notice given by her October 17 cannot be considered "immediate."
3. A waiver of the condition as to the time within which proofs of death are to be furnished before action may be proved on the trial though not pleaded.
4. Evidence that after notice had been given to the company there was some subsequent correspondence between it and the plaintiff's attorneys, and additional proofs were received and retained by the company, if admissible at all, could be received only to show the fact of waiver and that the conditions of the policy as to furnishing proofs had been thus substantially complied with, and, even if sufficient for that purpose, was not admissible as substantial proof of any fact as to the accident or the cause of the death.
5. To allow the physician who treated the deceased, in an action upon an accident policy for his alleged accidental death, to answer the question, asked on his direct examination: "State now whether, in your judgment, his death was occasioned by those injuries, from all the evidence you had before you there at that time," was error. His opinion should be based either on his examination of the case or upon a proper hypothetical question.
6. The evidence in this case is *held* insufficient to sustain a verdict to the effect that the death of the insured was the result of accident, independently of all other causes.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

This is an action to recover upon an accident insurance

policy issued by the defendant. The policy was in the principal sum of $1,600, and was issued June 29, 1895, to one Thomas F. Foster, a car repairer by occupation, in favor of his mother, the plaintiff, *Mary J. Foster*, in case of his death resulting from bodily injuries sustained through external, violent, and accidental means. The policy also contained a provision for the payment of weekly indemnity to the assured himself for disability resulting from injuries not producing death. The clauses of the policy which are material upon this appeal are as follows:

"Against bodily injuries sustained through external, violent, and accidental means, as follows: If death shall result within ninety days from such injuries, independently of all other causes, this company shall pay the principal sum of this policy to *Mrs. Mary J. Foster*, his mother, if surviving, or, in event of her prior death, to the legal representatives of the assured; (a) or, if the loss by actual separation at or above the wrist or ankle of *both hands* or *both feet*, or of *one hand and one foot*, or the irrecoverable loss of the sight of *both eyes* shall so result within ninety days, the company shall pay the assured *the principal sum* before named, which payment shall terminate the policy; (b) or if the loss by actual separation at or above the wrist or ankle of *one hand* or of *one foot* shall so result within ninety days, the company shall pay the assured *one half the principal sum* before named, which payment shall terminate the policy."

"This insurance does not cover disappearances, nor war risks, nor voluntary exposure to unnecessary danger, nor injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled; nor injuries, fatal or otherwise, received while or in consequence of having been under the influence of, or affected by, nor resulting, directly or indirectly, from, intoxicants, anæsthetics, narcotics, sunstroke, freezing, vertigo, sleep-walking, fits, hernia, or any other disease or bodily infirmity."

Among the conditions to which the policy was made subject were the following: "(4) Any medical adviser of the company shall be allowed to examine the person or body of the assured in respect to any alleged injury as often as he requires. (5) Immediate written notice must be given said company at New York City of any accident and injury for which a claim is to be made, with full particulars thereof, and full name and address of the insured. Affirmative proof of death, or loss of limb or of sight, or of duration of disability must also be furnished the company within two months from the time of death, or of loss of limb or of sight, or of the termination of disability. Legal proceedings for recovery hereunder may not be brought till three months from date of filing proof at this company's home office, nor brought at all unless begun within six months from time of the death, loss of limb or sight, or the termination of disability. Claims not brought in accordance with the provisions of this clause shall be forfeited to the company."

The insured died on the 5th of September, 1895, at Hurley, in this state, being then in the employ of the Wisconsin Central Railway Company as car repairer. The complaint alleged that he died by reason of injuries received by him by an accidental fall from a freight car at Hoyt's station, on or about August 31, 1895; and further, that the said insured in his lifetime, and the plaintiff after his death, each fulfilled all the conditions of the policy; and that the plaintiff, on the 15th of October, 1895, and more than three months before the commencement of this action, gave the defendant notice in writing of the said injury to and death of Thomas F. Foster. The answer admitted that Foster died at Hurley, September 5, 1895, and that the defendant received from the plaintiff notice of such death on October 17, 1895, and not before, and further alleges that Foster died of disease and infirmities, and not by accident, and that no affirmative proof that his death was caused by accident has ever been fur-

nished. At the time of the death of the insured, the plaintiff lived at Stevens Point, Wisconsin, and was not present when her son died. His death took place at an hotel in Hurley, and apparently as a result of a severe attack of cholera morbus. There was no direct evidence that the insured had met with an accident, but bruises were found upon his back, and certain testimony was given by the physician who attended him which, it was claimed, was sufficient to entitle a jury to find that his death was caused by an accident or fall which produced the bruises. A motion for nonsuit was made at the close of the plaintiff's evidence, which was denied, and a motion to direct a verdict for the defendant at the close of the entire evidence was also denied. A verdict was returned for the plaintiff for the full amount of the policy, and a motion to set the same aside upon exceptions, and because contrary to the law and the evidence, was denied. From judgment for the plaintiff upon the verdict the defendant appeals.

For the appellant there was a brief by *Curtis, Reid & Smith*, and oral argument by *A. H. Reid.*

For the respondent the cause was submitted on the brief of *Cate, Sanborn, Lamoreux & Park.* To the point that the question how far the notice given complied with the policy was a question for the jury, they cited 1 Am. & Eng. Ency. of Law, 92*d*, note 4; 9 id. 933; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Niagara F. Ins. Co. v. Scammon*, 100 id. 644.

WINSLOW, J. There are several reasons why this judgment must be reversed.

1. The policy provides that immediate written notice must be given to the company of any accident and injury for which a claim is to be made, with full particulars thereof. This was a condition precedent to a recovery. The word "immediate," in this connection, means such convenient time

as was reasonably necessary under the circumstances to do the thing required. *Kentzler v. Am. Mut. Acc. Asso.* 88 Wis. 596. Where the facts are uncertain or disputed, and the inferences doubtful, the question whether timely notice was given is one for the jury under proper instructions; but, where the facts are not in dispute, and the inferences are certain, it is a question of law for the court. *Kimball v. Howard F. Ins. Co.* 8 Gray, 33; *Baker v. German F. Ins. Co.* 124 Ind. 490; *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 609.

Here the facts as to the diligence used in giving the notice are not in dispute. The accident is claimed to have taken place somewhere from the 1st to the 5th of September. The death of the insured occurred September 5th. The plaintiff went to Hurley to ascertain the cause of her son's death, September 14th, and remained until the 17th. She herself testifies that while there she became satisfied as to the cause of his death. We have discovered nothing tending to show that she ever obtained any further information. She took no further steps until October 2d, when she employed attorneys, and on October 12th one of her attorneys went to Hurley, and procured affidavits of the attending physician and the undertaker at Hurley, and returned to Stevens Point October 14th. On October 16th, a notice, stating that the death resulted from an accident, describing it as a fall from a box car on or about August 31, 1895, at Hoyt's station, and an affidavit showing burial of the body by an undertaker at Stevens Point, were mailed to the defendant at New York City, and received not earlier than October 17th. Thus the proof is that the beneficiary knew the facts which satisfied her that her son's death was accidental as early as September 17th, and gave no notice of the accident to the company until the following 16th day of October, an interval of twenty-nine days. A notice given after the lapse of such length of time with knowledge of the facts cannot be held

"immediate" notice. The decisions to this effect are numerous, and well-nigh unanimous. Niblack, Ben. Soc. & Acc. Ins. § 416.

It was argued that the requirement of notice applied only to accidents or injuries not resulting in death, but we think the plain words of the policy cannot be so construed. The provision is that immediate notice must be given of "any accident or injury for which a claim is to be made." An accident resulting in death is certainly as much one for which a claim is to be made as one resulting simply in disablement, and the necessity of a notice is certainly fully as great, if not greater. Under the proofs before us we hold as matter of law that the notice given was not an immediate notice.

2. In addition to the notice the policy in suit requires affirmative proof of death to be furnished to the company within two months from the time of death. After the notice and affidavit of the Stevens Point undertaker, before mentioned, were mailed to the company, October 16th, some correspondence took place between the plaintiff's attorneys and the company or its claim agents relative to the claim of the plaintiff. On December 13, 1895, the plaintiff's attorneys wrote that they had additional proofs that Foster's death was accidental, and offered to furnish them. To this the defendant's assistant examiner of claims replied that, "we would be pleased to receive any statements you may have bearing on the matter," whereupon the plaintiff's attorneys mailed to the examiner two affidavits,—one by the undertaker at Hurley, describing the bruises on the body of the deceased, and one by the attending physician, stating his treatment of the case; also stating his belief, from information received by him, and also in answer to a hypothetical question, that the death of the deceased was due remotely to injuries received by the deceased. These affidavits appear to have been received at New York about December 20th, and to have been retained by the company. January 3, 1895,

the examiner wrote, in effect, denying liability, because the death was not the result of accident, and calling attention to the plaintiff's failure to make her claim in accordance with condition 5 of the policy. There was also some subsequent correspondence, and the entire correspondence and the affidavits were offered and received in evidence generally, against general objections of incompetency and immateriality as well as the specific objection that no foundation had been laid in the pleadings for such evidence.

This evidence, if admissible at all, was admissible only to show that sufficient proofs of death had been furnished, and that the requirement that such proofs be furnished within two months after the death had been waived by the acts of the company. It is said by appellant that no waiver could be shown, because it was not pleaded, and that, if waiver was relied upon, it must be specially pleaded, and cannot be shown under an allegation of performance of conditions. This contention seems to be adversely ruled against by the decision in the case of *Zielke v. London Ass. Corp.* 64 Wis. 442, and must be overruled upon the authority of that case. But, as before stated, it could only be received to show the fact of waiver, and that the conditions of the policy as to furnishing proof had been thus substantially complied with, and we regard it as sufficient for that purpose; but it was not admissible as substantive proof of any fact as to the accident or the cause of the death. *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585. It was, however, introduced, and received generally in the case, and was used and read to the jury as proof tending to show that the death was the result of accident. Both the letters and the affidavits contained many statements of fact and opinions bearing on the cause of death which were well calculated to be regarded by the jury as substantive proof upon the question, and it was error to receive it, and allow it to be used for this purpose.

3. Dr. Turner, the physician who treated the deceased,

was asked the following question upon his direct examination: "State now whether, in your judgment, his death was occasioned by those injuries, *from all the evidence you had before you at that time.*" An objection to the question was overruled, and he answered the question affirmatively. This was error, because the question does not show the facts upon which his opinion was based. It may be that it was based largely upon hearsay. Indeed, his further examination tended to show that such was the fact. Such an opinion should be based either on his examination of the case or upon a proper hypothetical question, and not upon a question which allows the witness to base his answer upon his own idea of what is evidence and what is not evidence.

4. We cannot refrain from saying that, in our judgment, the evidence was entirely insufficient to sustain the verdict that the death of Foster was the result of accident, independently of all other causes. It would not be useful to attempt to review all of the evidence, which was very voluminous. It is sufficient to say that there was no direct proof of any accident. The body of Foster had some bruises of recent origin, and one or two small abrasions upon the back, at the crest of the pelvis, and along the spine, but how or when they were inflicted does not appear. The evidence was very strong tending to show that his death was the result of a sudden and severe attack of cholera morbus or dysentery. The medical expert evidence which it is claimed justifies a conclusion that his difficulty resulted from the injuries which produced the bruises was very unsatisfactory in its character and inconclusive. Certainly it comes short of proving that any accident, independent of all other causes, produced his death.

By the Court.— Judgment reversed, and action remanded for a new trial.

DEWEY, Appellant, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

99 455
104 259
99 455
105 224
105 464
99 455
110 [1]467

April 15 — May 3, 1898.

Appeal, what reviewed: Railroads, when not liable for frightening horses.

1. Where the trial court decides there is no evidence to warrant a verdict in plaintiff's favor, and grants a nonsuit or directs a verdict accordingly, the decision will not be disturbed on appeal unless it clearly appears by the record to be wrong.
2. Injuries resulting from the frightening of a horse by the appearance of moving railway cars, trains, or locomotives, or the usual noises or incidents of their ordinary operation, are *damnum absque injuria.*

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action to recover for personal injuries. The complaint states that as plaintiff was traveling on Adams street in the city of Portage, in a buggy drawn by a single horse, approaching defendant's railway track at a point where it intersects or crosses such street, one of defendant's locomotives, in charge of its servants, passed over the crossing, and, after going a short distance beyond it, was brought to a stop; that just as the horse was about to cross the railway track, proceeding quietly and under full control of the driver, the engine being about thirty feet away, defendant's servants, without any warning, carelessly started such engine, causing it suddenly to exhaust steam with a loud noise, and to emit a great volume of smoke and cinders, whereby the horse was frightened, became unmanageable, and suddenly turned and overturned the buggy, causing the injuries complained of. The complaint further states that defendant had a flagman at the crossing, but that he negligently permitted the driver of the horse to approach the place of danger without any warning to him or plaintiff,

and that defendant's servants in charge of the engine knew of the situation of the horse at the time they started it. The evidence tended to show that the engine was moving away from the crossing when the accident happened; that it passed over the crossing as the horse approached, and stopped for a legitimate purpose; that it was started up slowly and without any unusual noise; that smoke and steam, naturally emitted by the operation of starting the engine, were carried by the wind towards the horse, causing him to become suddenly uncontrollable, and to turn and overturn the buggy, injuring plaintiff as alleged. At the close of the evidence a nonsuit was granted on defendant's motion. Judgment was rendered accordingly in defendant's favor and plaintiff appealed.

The cause was submitted for the appellant on briefs by *Fowler & McNamara*, and for the respondent on the brief of *J. B. Taylor*, attorney, and *Burton Hanson*, of counsel.

MARSHALL, J. This case is ruled by the well-settled principle that where the trial court decides that there is no evidence which will support a verdict in plaintiff's favor, and grants a nonsuit or directs a verdict accordingly, the decision cannot be disturbed on appeal unless the record shows that it was clearly wrong. *Powell v. Ashland I. & S. Co.* 98 Wis. 35.

It appears that the way on which plaintiff was driving when injured was clear as the horse approached the railway track; that the engine was in plain sight some distance from the line of travel, and was about to move westward, away from the crossing, to the knowledge of the driver of the horse. Such being the case there was no occasion for any warning being given by the flagman. Whatever danger existed was as well known to the driver and to plaintiff as to the flagman. Moreover, the danger, of which it was the flagman's duty to warn travelers about to cross the railway

track, i. e. that trains, locomotives, or cars were about to pass, did not exist at all.

The driver testified that when the engine started, it made a slight exhaust or puff, that steam and smoke escaped, but that there was nothing unusual as to noise, smoke, or steam; that there was a strong wind blowing which carried the steam and smoke directly towards the horse, whereby it was frightened and caused to make the movement which threw plaintiff to the ground and injured him; that witness was uncertain just what sound was made, or whether steam came from the cylinder cocks, but said he did not think anything unusual occurred. Another witness testified that she observed the engine at the instant of the accident; that she saw steam escaping from the lower part of the engine in front, and that it made a pretty loud noise. Plaintiff testified that steam escaped from the engine back of the cowcatcher with a loud noise; that the wind was blowing very hard from the west. From this, at most, it appears that the engine was started in the ordinary way, and that the exhaust of steam was either into the smoke-stack or through the cylinder cocks, in either case nothing out of the ordinary way of operating a locomotive under the circumstances. In this we are unable to see any evidence of negligence on the part of defendant's servants. They had a right to move the engine in pursuit of defendant's business in which they were engaged, and without responsibility on defendant's part for the consequences of any of the ordinary noises which the operation of the engine caused, or such incidents as the ordinary escape of smoke and steam. If such were not the case, railway companies would be greatly embarrassed in the performance of the duties they owe to the public. There appears to have been an utter failure to show any excessive or unreasonable blowing off of steam, or any unusual noise, or anything not ordinarily attendant upon the usual movements of a locomotive. That where injuries result from the frightening of

horses by the sight of moving cars, trains, or locomotives, or the usual noises or incidents of their ordinary operation, there is no liability on the part of the railway company, is firmly established and recognized as the law. *Abbot v. Kalbus*, 74 Wis. 504; *Cahoon v. C. & N. W. R. Co.* 85 Wis. 570; *Flaherty v. Harrison*, 98 Wis. 559; Elliott, R. R. § 1264, and numerous cases cited.

By the Court.—The judgment is affirmed.

---

99 458
s109 553

TRAPP, Respondent, vs. THE NEW BIRDSALL COMPANY, Appellant.

April 15 — May 3, 1898.

Sale of chattels: Warranty: Evidence: Conditions: Waiver.

1. A machine sold under a warranty which provided that "if the purchaser does not make full settlement, in cash or approved notes, for the machine, on its delivery to him, he thereby waives all claims under this warranty," was delivered by the seller on the premises of the buyer without any request for settlement by note, and about one month afterward, with knowledge of the facts, he received and retained the buyer's note for the price. *Held*, that the seller thereby waived his right to rely upon the delay of settlement as a forfeiture of the special warranty.
2. A provision in a contract of sale of a machine expressly requiring the purchaser to give written notice of all defects to the seller with reasonable time to repair the same, is a condition precedent, compliance with which is essential to a recovery for a breach of the warranty.
3. A breach of warranty, that a fifteen horse power engine sold under it was "capable of doing as much and as well as other machines of like size and proportions," is not established by proof merely that it did not or could not be made to develop and maintain fifteen horse power, without evidence that other engines of the size and proportions of the one in question were capable of developing and maintaining effectively that much power.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action for breach of warranty in the sale of a threshing machine engine. On the 29th day of January, 1895, the defendant, through its duly-authorized agent, sold to the plaintiff a threshing machine engine for $1,200, payable $400 in an old engine, and $800 January 1, 1896, with the following warranty in writing: "This machine is hereby ordered, purchased, and sold, subject to the following warranty: That the machine is well built, of good materials, and with proper management is capable of doing as much and as well as other machines of like size and proportions." The contract of sale contained the following stipulations: "The purchaser agrees, if the machine should not work well, to give written notice to the Birdsall Co., at Auburn, N. Y., stating wherein it fails, and also give like notice to the agent from whom it was received. It is agreed that notice shall be given both to the company and the agent, and notice to either alone shall not be sufficient. Reasonable time is to be allowed to get to it and remedy the defects, if any exist. . . . If it cannot be made to perform as guaranteed, it shall be returned to place where received and a new machine given in its place, or the notes and money refunded. . . . If the purchaser does not make full settlement in cash or approved notes for the machine upon its delivery to him, he thereby waives all claims under this warranty and the whole of the purchase money becomes due and demandable."

The written contract was set forth in full in the complaint, with allegations in addition in regard to representations as to the capacity of the engine, made at the time of the making of the written contract, but not included therein. The complaint alleged that the engine failed to fulfill the guaranty, in that it was poorly constructed, not of good material, and that it was not capable of doing work it was

warranted to perform. Performance of all the conditions precedent to plaintiff's right of action on the warranty was duly pleaded. The answer denied all the allegations of the complaint in regard to the alleged breach of warranty, and the performance of the conditions precedent to plaintiff's right to rely on it.

At the close of the evidence, defendant's counsel moved the court to direct a verdict in defendant's favor upon the ground that there was no evidence to sustain the allegations of the complaint as to the breach of warranty, and that the warranty was waived. The motion was denied and due exception taken to the ruling. The cause was then submitted to the jury for a special verdict, which resulted in findings, so far as they relate to the questions presented on this appeal, in substance as follows:

(1) The engine was not well built, was not built of good material, and, with proper management, was not capable of doing as much and as well as other machines of like size and proportions.

(2) The machine was delivered June 3, 1895, and settled for July 1st, thereafter.

(3) We assess plaintiff's damages at $1,281.

Defendant's counsel moved the court for judgment in defendant's favor notwithstanding the verdict, and also moved the court to set the verdict aside and for a new trial, among other things, because the verdict was contrary to the evidence, both of which motions were denied, and the rulings duly excepted to. Judgment was rendered in plaintiff's favor upon the verdict, from which defendant appealed.

Maurice McKenna, for the appellant.

J. J. Sutton, for the respondent.

MARSHALL, J. The first question requiring consideration is, Was the special warranty, relied on by plaintiff, forfeited by a failure to settle for the engine at the time of its deliv-

ery, by giving approved notes for that part of the consideration to be paid in money January 1, 1896? The contract made the warranty contingent on such settlement, and it stands conceded that the engine was delivered June 3, 1895, and was not settled for by giving approved notes till July 1st thereafter. Admitting, for the purposes of this case, that strict performance of the condition in regard to the settlement was necessary in order to preserve the special warranty, in the absence of a waiver of such performance, it must be held, in accordance with the plainest principles of estoppel or waiver by conduct, that the delivering of the machine by defendant on plaintiff's premises, without demanding or requesting settlement by note, the acceptance of the note thereafter, and retention and use of the machine by plaintiff with knowledge of the facts, all of which appear by the evidence, effectually waived the element of delay, if there was any. Authorities on the subject of waiver of provisions as to forfeitures in contracts of this kind are numerous, but the principles involved are too elementary to warrant citing such authorities in this opinion.

The next and really only other question which need be noticed is, Was there any evidence to support the finding of the jury that the engine was not of good material and well built, and not capable of doing as much and as well as other machines of like size and proportions? If not, then defendant's motion for the direction of a verdict should have been granted, and the court, failing in that, should have granted the motion to set aside the verdict as contrary to the evidence.

Was the engine made of good material and well built? There is testimony that the cylinder head, piston head, and cross head all broke at one time, but plaintiff testified that such occurrence was caused by the engineer allowing the cross head to get loose,— that it was his fault and not the fault of the machine; and the evidence all tended to show

that the accident was not attributable to any defect, either in the construction of the engine or the material of which it was built. Nevertheless defendant, when notified of the accident, promptly repaired the machine, and, as plaintiff said, made it as good as ever. There was evidence that the safety plug melted; also that one of the fire grates melted down. In regard to that, plaintiff, and other witnesses as well, testified in effect that such occurrences were probably the fault of the person in charge of the engine. Plaintiff said of the quality of the machine as to workmanship and material: "There was nothing about the engine that I can say was defective so far as material was concerned. Don't know anything except the piston head, cross head, cylinder head, and safety plug. Did not seem to have trouble with anything else except the grates; the blame for that was on the man in charge of the engine."

From the foregoing it is manifest that there was no evidence to warrant the verdict that the machine was not well built and of good material. Moreover, the contract expressly required the purchaser to give defendant written notice of all defects, with reasonable time to repair the same, before declaring on the warranty, and the evidence shows that no written complaint was made involving the subject of faulty material or construction, so the issue in that regard should have been taken from the jury.

The only other element of the warranty in issue is, Was the engine capable, with proper management, of doing as much and as well as other machines of like size and proportions? We are unable to find satisfactory evidence in the record that notice, written or otherwise, was given to the defendant on that point. The most that can be claimed is that written notice was given that the engine would not do the work of operating plaintiff's threshing machine with its attachments. Plaintiff's version of the contents of the notice was that "the engine *would not do the work.*" It is mani-

fest, when that is considered in connection with all plaintiff's evidence in the case, that his complaint really was, not that he failed to get a fifteen horse power engine capable of doing work equal to that of similar machines, but that he did not obtain an engine that would develop fifteen horse power and run his Advance separator with all the attachments,—bagger, self-feeder, and blower,—which required from six to eight horse power in addition to the ten or twelve required to run an ordinary machine without such attachments. But conceding that the notice to the defendant that the engine "*would not do the work*" should be interpreted to mean the work guaranteed, and that it was sufficient to lay a proper foundation for resort to defendant's liability on the warranty, then the cause of action cannot be sustained by mere proof that the engine did not develop fifteen horse power. That was not guaranteed. Nor by evidence that the engine was not capable of developing and maintaining fifteen horse power in the actual operation of running a threshing machine. That was not what defendant guaranteed. The case seems to have been tried and submitted to the jury on the assumption, without evidence, that an engine of the size and proportions of the one in question is capable of developing and maintaining, in operation, fifteen working horse power. With that as the test, plaintiff and several other witnesses testified that the engine in question would not develop and maintain, effectively, that much power. No comparison of the working power of the engine was made by any witness with any other machine of like size and proportions, nor was any evidence produced of the working power, in actual operation or otherwise, of similar machines. So, as to the real issue of fact in the case, i. e. whether the engine was capable of doing as much and as well as other machines of like size and proportions, even if we say complaint was made in writing as required by the contract on that point, there was no

evidence produced and preserved in the record, that we can discover, to sustain the affirmative.

It follows that the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

By the Court.— So ordered.

---

99 464
s107 438

99 464
110 [1]163

99 464
s117 415

COLLINS, by guardian *ad litem*, Respondent, vs. THE CITY OF JANESVILLE, Appellant.

April 15 — May 3, 1898.

Appeal: Damages for permanent injury: Expert testimony.

1. In order to recover damages on the ground that the injury complained of is permanent, the evidence must show such permanency with reasonable certainty. To allow an expert physician to testify that the plaintiff was liable to be bothered with the injury for several years and might be always, at least under certain conditions such as overuse of the injured member, was error.
2. It was also error, in such action, to allow such expert physician to testify to the effect that consumption in the family of plaintiff's parents would show a strong susceptibility in all the family to the infection of consumption, particularly in swollen tissues which do not fully recover their normal condition after injury, such evidence being, at most, conjectural, and certainly inadmissible without first laying a foundation for it by showing that the plaintiff was consumptive or reasonably certain of being so.
3. On appeal, the court will not consider the question of excessive damages, if the bill of exceptions is not certified to contain all the evidence, and there was no motion for a new trial on that ground.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *H. McElroy*, and for the respondent on that of *J. J. Cunningham.*

CASSODAY, C. J. This action is brought to recover damages for personal injuries sustained by reason of falling upon an alleged defective sidewalk. The plaintiff was, at the time of the injury, between twelve and thirteen years of age. Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff, and assessed her damages at $1,500. From the judgment entered thereon the defendant brings this appeal.

Error is assigned because an expert physician, in answer to a hypothetical question, was allowed to testify to the effect that the plaintiff was liable — quite likely — to be bothered with the injury for several years, and might be always, at least under certain conditions, as overuse. The rule is well settled that, in order to recover damages on the ground that an injury is permanent, the evidence must show such permanency with reasonable certainty. *Hardy v. Milwaukee St. R. Co.* 89 Wis. 187; *Block v. Milwaukee St. R. Co.* 89 Wis. 371; *Raymond v. Keseberg*, 91 Wis. 195; *Groundwater v. Washington*, 92 Wis. 61. The amount of the verdict makes it quite certain that the jury must have found the injury to have been permanent. To allow a verdict to be based upon such conjectural evidence would be to defeat the ends of justice.

Error is assigned because an expert physician was allowed to testify to the effect that consumption in the family of the plaintiff's father or mother, especially the immediate family, would show a strong susceptibility in all of the family to the infection of consumption,— local tuberculosis,— particularly in swollen tissues which do not fully recover their normal condition after injury; that he could not say whether the inflammatory condition of the surface of the bone and the ligaments which he saw was so infected; that consumption would have a bearing in the case, and that in the course of years would affect it,— probably would; that there was danger of it; that stating that it would probably occur was

stating it with a little greater degree of certainty than he desired, but there would be a great likelihood of its occurring,—a danger which he regarded as the greatest danger in the case,—the danger of becoming affected with that disease. Such evidence was, at most, conjectural, and was certainly inadmissible, without first laying a foundation for the same by showing that the plaintiff was consumptive or reasonably certain of being consumptive. It does not appear that that was done. This court has repeatedly held that the presence of disease may aggravate and prolong an injury, and correspondingly increase the damages recoverable. *McNamara v. Clintonville*, 62 Wis. 211, and cases there cited.

Counsel insist that the damages are excessive, but with no certificate that the bill of exceptions contains all the evidence, and no motion for a new trial on that ground, we are not at liberty to determine the question.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

---

99 466
112 [1]507

MURPHY, Administrator, Appellant, vs. QUINN, Respondent.

April 15—May 3, 1898.

Evidence: Transactions with decedent: Appeal, finding not against weight of evidence.

1. In an action by an administrator to recover certificates of deposit in possession of and claimed by the widow of the decedent, testimony by the defendant that she did not indorse the name of the decedent upon such certificates, and that she had had them in her possession since nearly two months before his death, is not incompetent under sec. 4069, R. S. 1878. These are not statements of transactions with a deceased party.
2. In a case tried by the court, its finding will not be disturbed on appeal if not clearly against the weight of the evidence.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This action was brought by *Lawrence B. Murphy*, as administrator of the estate of one James Quinn, who died March 21, 1896, aged eighty-one years. The defendant was the widow of the deceased by a second marriage. The complaint charged that the deceased died owning three houses in the city of Madison, two government bonds of $500 each, and four bank certificates of deposit, aggregating $1,900 in amount; that the defendant falsely claimed that the said certificates had been given and indorsed to her by James in his lifetime, but that such gift never was made; and that, if she had acquired possession of the certificates before the death of James, such possession was obtained by fraud and undue influence. The answer denied the allegations of the complaint, and alleged that the deceased, in January, 1896, gave the certificates to the defendant on account of natural love and affection. The case was tried by the court, which found that the certificates were indorsed by the deceased, and given by him to the defendant in the latter part of January, 1896, and have been in her possession ever since, and that the transaction constituted a valid gift *inter vivos.* From judgment for the defendant on this finding, the plaintiff appeals.

For the appellant there was a brief by *Jones & Stevens*, and oral argument by *B. W. Jones.* They argued that the testimony of the defendant was incompetent under sec. 4069, R. S. 1878. The prohibition of that statute extends to negative testimony intended to establish the affirmative inferentially. There was no pretense that the certificates came to defendant's possession in any way except by direct delivery from the decedent. *Clift v. Moses*, 112 N. Y. 426; Underhill, Evidence, 442. There was no clear, satisfactory, and incontrovertible evidence to establish the alleged gift. *Marshall v. Jaquith*, 134 Mass. 138, 140; *Devlin v. Green-*

wich Sav. Bank, 125 N. Y. 756; *Grey v. Grey*, 47 id. 552; *Rogers v. Rogers*, 153 id. 356; *Nesbet v. Lockman*, 34 id. 167; *Resch v. Senn*, 28 Wis. 286; *Kinney v. Public Adm'r*, 2 Bradf. 319; *George v. Spencer*, 2 Md. Ch. 353; *Herr's Appeal*, 5 Watts & S. 494; *Walter v. Hodge*, 2 Swanst. 97; *Dills v. Stevenson*, 17 N. J. Eq. 408; *Martin v. Smith*, 25 W. Va. 579.

For the respondent there was a brief by *Olin & Butler*, and oral argument by *Knox Kinney* and *H. L. Butler*.

WINSLOW, J. There is but one question of law in this case. The defendant was allowed to testify against objection that she did not herself indorse the name of James Quinn upon the backs of the certificates of deposit in controversy, and that she had had the certificates in her possession since the latter part of January, 1896. It is claimed that these are statements of transactions with a deceased party, and incompetent, under sec. 4069, R. S. 1878. This contention seems fully answered by the decision of this court in the case of *Stewart v. Stewart*, 41 Wis. 624. There the question was whether a deed had been delivered by a deceased grantor to the defendants, and it was held that they could testify as to how long it had been in their possession, and that such testimony would not be testimony of any transaction had by them with the deceased. It is equally apparent that a denial by the defendant that she had forged the name of the deceased on the back of the certificates is not evidence in respect to a transaction with the deceased.

The remaining questions are questions of fact. The defendant produced direct evidence to show that the certificates were actually indorsed by the deceased in his lifetime, and delivered to the defendant, as well as expert evidence to the effect that the signatures upon the backs of the certificates were in fact the signatures of the deceased. On the other hand, the plaintiff introduced expert evidence to

the effect that the signatures were not written by the deceased, and also produced evidence of collateral facts tending to disprove the alleged gift. Upon all this testimony, the trial judge who saw the witnesses determined that the alleged gift was sufficiently proven. We are unable to say that this conclusion is clearly against the weight of the evidence, and hence we cannot disturb it.

By the Court.—Judgment affirmed.

KNUTSON and wife, Appellants, vs. BOSTRAK and wife, imp., Respondents.

99	469
p113	315
113	317
99	469
57 LRA	462

April 16—May 3, 1898.

Conveyance by parents on condition of support: Rescission for failure to perform: Remedies: Waiver.

1. The consideration for the conveyance of a farm and personal property by parents to their son was his agreement to support them during the remainder of their lives; to furnish them each year certain food supplies, the use of certain portions of the dwelling with free ingress and egress to any part thereof; to furnish them plenty of firewood and water ready for use at all times, and to care for them in all things, and furnish them with a doctor and medicine when needed, and with decent burial when dead. *Held*, that the agreement, fairly interpreted, required the son to devote his personal efforts to support and care for them, and that his failure to furnish his parents with a sufficiency of wood and water, and his getting married and removing several miles away, and failing to give them any personal care or attention, even when sick, but leaving them chiefly to care for themselves, were substantial breaches of his agreement, for which a court of equity would set aside the conveyances.
2. Although, as a part of the transaction, the son gave to his parents a mortgage on a part of the farm as security for the performance of his agreement, and another mortgage to secure the payment of a sum of money, they were not limited to their remedy on such mortgages.

3. That the parents commenced an action to foreclose one of such mortgages, which however they dismissed before commencing the action to set aside the conveyances, was no waiver of or bar to their right to maintain the latter action to obtain the relief sought therein.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This action was brought to set aside and rescind a conveyance of certain real estate, a bill of sale of personal property, and the agreement under which they were executed, between the said plaintiffs and the defendant, their son, *Knut J. Bostrak.* There was a finding and judgment in the circuit court against the plaintiffs, upon which judgment was given against them denying the relief claimed, from which they appealed.

The complaint stated, in substance, that the plaintiff *John Knutson*, December 8, 1892, was, and for a long time had been, the owner in fee and in possession of 165 acres of farming land therein described, of the value of $7,000, and owned a large amount of personal property, stock, and farming implements, of the value of $1,000; that the plaintiff *John Knutson* being of the age of seventy-three years, and his wife, *Mary Knutson*, of the age of sixty-eight years, and being both infirm of health and unable longer to take care of or superintend the said farm and property, and anxious to make such disposition of it as would secure to them a sufficient support in sickness and in health during the remainder of their lives, whereby they might be relieved from the labor and care of superintending it, and might be enabled to continue to live upon it, and make it their home, and might also have the care of a near relative, they agreed that the defendant *Knut J. Bostrak*, their son, should have a deed of said farm and a bill of sale of said personal property, and in consideration therefor he should secure to the plaintiffs a home on said farm, and provide them with food,

clothing, medical attendance, care, and assistance, both in health and in sickness, during their lives, or the life of the survivor, and that the defendant *Knut J. Bostrak* should also execute and deliver a note and mortgage to the plaintiff *Mary Knutson* for $2,000, payable in ten years, and that the title to said premises in said defendant *Bostrak* should be contingent upon the complete performance of the agreement set forth in the complaint; that the defendant agreed to receive such conveyance and bill of sale on said terms, and to execute said note and mortgage, and to support and maintain the plaintiffs as above stated; and that they duly executed and delivered to him on that day a deed of said premises and a bill of sale of said personal property.

It was alleged that the defendant *Bostrak*, being then unmarried, in consideration therefor and as part of said transaction, executed and delivered to the plaintiffs a written agreement, in substance and to the effect stated; that is to say, that said *Bostrak*, in consideration of the conveyance of said lands then made to him by the parties of the second part, agreed and bound himself, his heirs, executors, and assigns, to support and care for the plaintiffs in sickness and in health, during their natural lives, or the life of either of them; to furnish to them on the 15th day of November, 1893, and annually thereafter on that day, 400 pounds of good flour, 100 pounds of pork, 100 pounds of beef, ten pounds of good coffee and twenty pounds of granulated sugar, twenty bushels of oats, five bushels of potatoes, twenty bushels of corn; to keep, feed, and care for (winter and summer) one horse, three cows, and three sheep; to milk said cows, and care for the milk, and churn the butter; to furnish to them the east room of the present dwelling, and all of upstairs of the same, and use of the cellar, to be kept in good order, and maintained, and to have free ingress and egress to the same through any part of the building; to furnish in the house plenty of good firewood and water ready for use at all times;

to have free use of the barn and basement for the stock, and the west part of the tool shed; to give them annually one half of the fruit raised in the garden on the trees that are now growing, and one half of the eggs from the chickens; to care for them in all things, and furnish them with a doctor and medicine when needed, and at death a decent burial.

To secure the performance of the above contract said *Bostrak* then and there duly executed and delivered to the plaintiffs a mortgage conditioned for the performance thereof, and covering the south sixty-five acres of the E. ½ of the S. E. ¼ of section 9, and the N. E. ¼ of the N. E. ¼ of section 16, town 6, range 11, Dane county, and being a portion of the lands conveyed on that day to him by the plaintiffs. Said deed and mortgage were duly witnessed, acknowledged, and recorded, and said *Bostrak* at the same time executed and delivered to the plaintiff *Mary Knutson* his note for $2,000, payable ten years after date, with interest at six per cent. payable annually after June 8, 1893, with the privilege of paying not less than $100 thereon at the end of any year; and to secure the same he duly executed and delivered to the plaintiff *Mary Knutson* a mortgage, bearing even date with said note, on the same property described in the mortgage given to secure said agreement for maintenance, and which was also duly witnessed and acknowledged. It was alleged that said deed, bill of sale, and contract for support, and the mortgages to secure said contract, and the promissory note and mortgage securing the same, were part and parcel of the same contract, and all of said instruments were executed and delivered at the same time, and that said *Bostrak* paid no other or different consideration for said premises and personal property except as contained in said agreements; that shortly thereafter the defendant *Bostrak* went into possession of the premises described, took possession of said personal property, and so remained until on or about May 25, 1896.

It was alleged that the defendant *Bostrak* had failed to perform the covenants of said agreement by failing to keep in order and maintain the rooms set apart for the plaintiffs, by failing to furnish in the house firewood and water, by failure to furnish them medical attendance when needed and requested, and had refused, and still refused, to furnish the articles and the support and care provided for in said contract, but, on or about May 25, 1896, left the premises, and went to reside on a different farm in said county, and that he had, since his departure, wholly failed to comply with any of the terms of said agreement, and by reason of such noncompliance the plaintiffs had re-entered the premises described as for condition broken, and were then in possession thereof; that he had appropriated all of said personal property, and changed its form so that it could not then be identified, and that a rescission of the bill of sale would be of no benefit to the plaintiffs; that defendant *Petrine Bostrak* is the wife of said defendant *Knut J. Bostrak*, and claims an inchoate right of dower in said premises; that May 2, 1896, *Knut J. Bostrak* executed and delivered to the defendant Susan S. Cady a mortgage on the premises described in said warranty deed for the alleged consideration of $3,000, which is recorded, etc., and plaintiffs allege that said Susan S. Cady knew, before receiving said mortgage, of the existence of said agreement for support, and that the title of the mortgagor, *Bostrak*, was liable to be defeated in case of noncompliance therewith; that said *Bostrak* on the same day executed and delivered to the defendant Stoughton State Bank a mortgage for $2,000, covering the property described in said warranty deed, that said mortgage was recorded, and that said bank knew, before receiving it, of the existence of said agreement for support, and that the title of the mortgagor was liable to be defeated in case of noncompliance therewith.

Judgment was prayed canceling said deed and contract,

and the mortgage securing said contract, and the $2,000 note and mortgage securing the same, and that all of said instruments might be declared void and of no effect, and that plaintiffs might have restitution of said premises, and that the court might divest the title of said *Bostrak*, and transfer the same to the plaintiff *John Knutson*, and for their costs and disbursements, and for such further and other relief as might be just.

The separate answer of *Bostrak* and wife admitted that at the time of the execution of said instruments plaintiffs were somewhat advanced in years, but denied that they were infirm in health, or unable longer to take care of and superintend said farm, and admitted that they were desirous of making such disposition of said property as would secure to them sufficient support and maintenance in health and in sickness during the remainder of their lives, or the life of the survivor, and that they sold and conveyed said real estate and personal property to *Knut J. Bostrak* in consideration of $2,000 and the execution of the contract mentioned, and admitted the making of the warranty deed and of the mortgage securing the $2,000 note, and the recording thereof. The answer averred that the defendant *Bostrak* had paid the interest on said note as it became due, except the last year's interest, and had paid the sum of $200 principal; that the plaintiffs commenced an action to foreclose said mortgage. They admitted the agreement set out in the complaint, and that it was recorded, and the making and execution of the mortgage to the plaintiffs to secure the performance of such agreement, and that in case of the failure or omission of the defendant to perform said contract he should be liable thereon in damages not to exceed $2,000, and not otherwise; that he took possession of said premises, and had since continuously held possession, and said personal property, except as to some portion of the same which had been used or disposed of by him. He admitted also the

execution of the mortgage to Susan S. Cady, as well as the mortgage to the Stoughton State Bank, and that both were recorded; and, except as specifically admitted or denied, they denied every allegation and matter stated in said complaint. The defendants averred that the agreement mentioned, and all parts thereof, had been fully performed as required, and alleged that May 25, 1896, they moved off from said premises to a farm within a few miles therefrom, with the full knowledge and consent of the plaintiffs, but that they had at all times fulfilled all the terms of said agreement, and offered to fulfill the same so long as the plaintiffs, or either of them, might live; that they had paid taxes, insurance, and for repairs, various sums, no part of which or of said interest or principal paid to the plaintiffs had been repaid to the defendant; that certain of the work stipulated to be done by the defendant in said agreement had been, during the entire existence of the contract, done by the plaintiffs by their own desire and choice.

It was found by the court that the plaintiffs executed and delivered to the defendant *Bostrak* the warranty deed of the premises mentioned December 8, 1892, and that the plaintiff *John Knutson* sold and conveyed to said *Bostrak* certain personal property of the value of $450, and that he at the same time executed and delivered to the plaintiff the agreement or contract mentioned in the complaint, and to secure the faithful performance of said agreement he executed and delivered to the plaintiffs a mortgage for the sum of $2,000, in substance as stated in the complaint, as well as the note to *Mary Knutson*, for $2,000, and a mortgage securing the same as stated therein; that the defendant *Knut J. Bostrak* is the son of the plaintiffs, and said several agreements and instruments were made and entered into by him at the request of the plaintiffs; that at the time the plaintiff *John Knutson* was about seventy-three years of age, and *Mary Knutson* about sixty-eight years of age, and that the said

John Knutson had for many years been subject to occasional spells of fits, the sickness lasting from half an hour to two or three hours; that otherwise the health of said plaintiffs was good for people of their age; that shortly after the execution of said agreement the parties entered upon the performance thereof, and the defendant *Bostrak* had been in possession of the farm, worked the same and received the proceeds, and continued to reside thereon until May, 1896, when he removed onto a farm within a few miles of said premises, which was done with the knowledge and consent of the plaintiffs, upon the marriage of the defendant *Knut J. Bostrak* to the said *Petrine Bostrak.*

It was found that the defendant *Bostrak* furnished the plaintiffs on the 15th of November in each year, as required by said contract, the various articles mentioned and specified therein, and that it was stated by plaintiffs that, so far as the services required by said contract to be performed by the defendant, it was the desire of the plaintiffs that the same should not be performed except in case of their sickness, or for any other reason they were unable to perform them for themselves or demanded the performance thereof, as they preferred to do those things themselves, and for a number of years immediately before the commencement of the action the plaintiffs had been performing said services for themselves as a matter of choice, though said *Bostrak* was at all times ready and willing to perform the same; that during a portion of the last year defendant *Bostrak* failed to furnish plaintiffs with the full amount of wood required for their use, and during a short period, while the well was out of repair, did not furnish them with well water for use upon the premises as agreed, and for a considerable period he did not provide a pump for the well at the house, which made it necessary to draw the water from the well with a rope; that with these exceptions the defendant *Bostrak* had at all times fully performed all the conditions of said contract by him to

be performed; that he had paid to *Mary Knutson* the annual interest upon the note for $2,000, except the last two years' interest thereon, and had paid the sum of $200 of the principal, and the sum of $200 interest, which sums are still retained by the plaintiff *Mary Knutson;* that the fair rental value of the property was $300 per annum.

As conclusions of law the court found that the breach of said contract in respect to furnishing the wood and water was not a breach in a substantial matter, and did not entitle plaintiffs to a rescission of the agreement, and that there had been no such breach of said contract as to entitle plaintiffs to a rescission; that the plaintiffs, by their conduct and agreement, had waived their rights to assert the failure of defendant to comply with the literal terms of the written agreement as a breach thereof; that they were not entitled to a rescission of the deed and agreement as prayed, but their remedy was by an action to foreclose their mortgages; that the defendants were entitled to a judgment dismissing the plaintiffs' complaint, but without costs to either party, which was entered accordingly, and from which the plaintiffs appealed.

At the trial the plaintiff *John Knutson* testified, among other things, that he was past seventy-five years of age; that he acquired most of the farm thirty-one years before, and had made the improvements; that it was worth $7,000; that he had a disease of the heart, which made it impossible for him to conduct the farm, and when attacked with such sickness he could not see, but if he laid down on his hands and knees sometimes it passed off quickly and he regained his sight; that he had been subject to these spells for over fifty years; that he was very weak after having them; that they lasted for half an hour at a time, sometimes for an hour, and sometimes for two or three hours; that he made this arrangement with his son because he did not think he was strong enough to work the farm any longer, and he told the defendant *Knut J. Bostrak* that he was to have the

farm because he had some faith in him. "We were to be supported from that time until our death. It was said that he was to remain on the farm as long as we lived." He testified to the failure of the defendant *Bostrak* to perform the agreement; that for the first year, but not afterwards, he kept and cared for three cows; that he had not kept their rooms in order, and had washed them only once; that the pump had been taken from the well, so that they drew the water up with a rope and chain; that his son had not, after the pump was taken out, hauled any water for him; that the water became unwholesome, and unfit for use; that his son left the farm in May, 1896, and he did not know he was to leave until he saw them going away; since he left there had been no one living in the house but himself and wife, until within two or three weeks past; that from the time he left his son had done nothing for him or his wife except that he had given them in November what they were to have to live on. These things he had given them regularly, but had given them no personal care or attention, or sent any one to do so. There was firewood prepared last winter, in January, before he took it away, quite a lot, and he came and took it away himself, most of it; "but I protested against his taking it." There were about thirty wagon boxes of it in the wood shed, and a large pile outside, before he began hauling it away. Sometimes he came and took it away from the shed, and sometimes his hired man. Some of it witness had cut and prepared, and some he had, and some his hired man. "When he came there to get the last load I spoke of, I had a talk with him. 'Are you going to take the wood that is left now, *Knut?*' He said, 'Yes, I am.' 'You must not do that,' I said. 'Well, I am going to take it, every stick of it, if I can get it in the box; but I don't think I can get it all in.' 'But what am I to do for wood then, in the face of the cold winter?' I said. He left about half a box, as much as I thought would last about a

week, and if it had been cold it would have been too little for that time." But the plaintiff hired one Johnson to cut and prepare wood for him the last winter, and he worked himself as much as he was able. The defendant *Bostrak* did not furnish him any wood, and had not since. He had not carried in the house for them a single stick of wood or drop of water. He further testified that in 1896 his wife was sick about four weeks, was bedridden during that time, and during that time the son lived in the same house, but he was never in to see her, and did not offer to do anything for her. Last winter she was much sicker, four or five days. "He sent no one to help us, and did not, at that time, offer to do anything for us."

Mary Knutson, one of the plaintiffs, testified that after her husband deeded the land to *Knut Bostrak*, he (*Knut*) had not milked the cows or taken care of them, and had not furnished any water. In the winter of 1896 she was so sick she was lying in bed three or four weeks. "*Knut* was in the house, but never came into the room where I was sick; so far as I know, never asked how I was, and did not offer to do anything for me. Before he left the farm, he had no talk with me about leaving. I first learned he was going away about the time he left. Since that time he has never been to the house, or offered to do anything for us. Last fall I had a talk with him, and asked him if he was going to leave us alone during the winter. I said, 'Well, you know how your father is, *Knut*,'—that he was subject to his attacks while eating, and sometimes at night. 'It may be that it is dangerous for me to be alone.' He sent no one in the winter to help take care of us."

William Seamanson testified to a conversation with defendant *Bostrak* in March, 1897, when he was asked whether he would, in the future, fulfill the contract with the old folks, as he had agreed to, and he answered, "No, I cannot, and will not."

The defendant *Bostrak* testified that he told the old people in the summer of 1894 that he would do anything he could for them, whether it was in the contract or not, if they would speak to him; that he had never refused to do anything for the old people, or get anything for them, whether it was in the contract or not, if it was suggested to him; that he judged he left plenty of wood at the old place for two or three months; that neither he nor any of his men ever reported to him that he was out of wood, or anything of that kind; that he heard nothing about his mother being sick several weeks last winter, when he was there, and that he spoke to them about moving off the place before he moved, and they made no objection; that he saw his father and mother haul water from the well with a pail and rope a good many times; he never offered to do it for them; that he took no pains to furnish water to his parents; that he hauled quite a bit of wood away during the summer, some during the fall, and some during the winter; that he got the last load the 19th of January; that he did not go into the rooms of his parents in 1896 oftener than any other time, never went in except when he wanted to say something to them, and it might be months he would not go into the rooms at all; that he knew his father was subject to sick spells, and had them frequently, might have them in the daytime or nighttime, and knew that his father and mother were living there alone last winter; that his mother spoke to him one time about having some one to come there and stay.

It was shown that in May or June, 1894, *Knut Bostrak*, in a conversation between the parties, said he would do everything for his mother if she would speak to him about it,— baking the bread, fixing the meals, washing the clothes, and scrubbing the house and fixing things like that. She said, "No; I am going to fix my own bread, and my own meals, as long as I am able to do it." *Knut* said he would do

it whether it was in the contract or not, if they would speak to him about it. One Jacobson testified, on behalf of the defendant, to a conversation with the old gentleman, in which he stated, in substance, that all the trouble came from himself and his wife; that *Knut* had done everything that could be done for them, all that could be expected any one would do, and that, if they had done what was right, *Knut* would not have left the place.

For the appellants there was a brief by *Erdall & Swansen* and *H. A. Huber*, and oral argument by *John L. Erdall.*

A. W. Anderson and *G. E. Roe*, for the respondents, argued that, to justify a rescission of the conveyances, a breach of the agreement in a substantial part comprehending the root of the whole must be proved. Here no such breach was proved. *Smith v. Smith*, 34 Wis. 320; Bishop, Cont. § 828; *Tucker v. Tucker*, 35 Mich. 365; *Norton's Adm'r v. Perkins*, 67 Vt. 203; 3 Am. & Eng. Ency. of Law, 922–925; *Reid v. Burns*, 13 Ohio St. 49. The plaintiffs have waived the right to rescind by accepting articles provided for in the contract, and by not objecting to things now claimed as breaches, and also by commencing to foreclose a mortgage which was a part of the transaction. *Thrall v. Thrall*, 60 Wis. 503; *Willard v. Henry*, 2 N. H. 120; *Hubbard v. Hubbard*, 97 Mass. 188; Jones, Real Prop. § 702. The commencement of such foreclosure was an election of their remedy which prevents their subsequently rescinding. *Crook v. First Nat. Bank*, 83 Wis. 31–42, and cases cited; *Hildebrand v. Tarbell*, 97 id. 446; *Thomas v. Watt*, 104 Mich. 201; *Morris v. Rexford*, 18 N. Y. 552; *Conrow v. Little*, 115 id. 387. The plaintiffs' proper remedy was by foreclosure of the mortgages. *Peterson v. Oleson*, 47 Wis. 122.

PINNEY, J. Considerable evidence was produced at the trial showing the relations existing between the parties, and how completely the family arrangement into which they

had entered with the best of intentions had miscarried and substantially failed to accomplish its purpose. There is no reason, we think, to suppose that the parties, with mutual accord, will again attempt to carry out its provisions. The pleadings and evidence, in our judgment, show abundant ground for rescinding the agreement and the deed of conveyance and bill of sale executed under it, and for restoring the parties, as near as may be, to their former rights and condition. From a fair construction of the agreement and the various instruments executed at the same time, as applied to the subject matter and situation, we think they must be construed together, and regarded as parts and provisions of a single instrument. They appear to have been induced largely by the confidence the plaintiffs very naturally had in their son. An equitable accounting and adjustment of the matters and differences between the parties should be adjudged according to their respective rights as they may appear. The pleadings are so framed that such a judgment may be rendered as between them, and which will provide for and adjust all their rights and equities.

The agreement manifestly required the defendant *Bostrak*, in consideration of the conveyance of the lands then made to him by the plaintiffs, to support and care for his aged and infirm parents in sickness and health during their natural lives, or the life of either of them; to furnish to them on the 15th of November in each year, and annually thereafter, certain specified articles of food, and the use of certain portions of the dwelling, with free ingress and egress therefrom to any part of the building; to furnish in the house plenty of good firewood and water ready for use at all times; and "to care for them in all things and furnish them with a doctor and medicine when needed, and at death with a decent burial." They were transferring and conveying to their son their farm and home with which they had provided themselves by the care and industry of a lifetime,

where he should personally minister to their wants and necessities, and which was still to be their home and refuge in their declining years. Evidently the language used, taken in connection with the situation and circumstances, clearly indicated and amounted to a promise that he would devote his personal efforts to support and care for them, and carry out the terms of the agreement according to their fair import and meaning. The consideration for the conveyance of the farm and bill of sale of the personal property was the agreement entered into by the son for the support and maintenance of his aged and infirm parents during their lives. The performance of the condition upon which the conveyance and transfer were made was executory, and when taken and construed together, they appear to have been taken and held by the defendant under a condition subsequent for the support and care of his aged parents. *Beckman v. Beckman*, 86 Wis. 655; *Hartstein v. Hartstein*, 74 Wis. 1; *Bogie v. Bogie*, 41 Wis. 209; *Bresnahan v. Bresnahan*, 46 Wis. 386; *Blake v. Blake*, 56 Wis. 393; *Delong v. Delong*, 56 Wis. 514. It is in accordance with the principle of these cases for a court of equity to freely set aside such conveyances for a breach of such condition, and to do full equity between the parties thereto as the circumstances of the case may require. It is plain that it was intended that the plaintiffs were to be supported and cared for by the defendant, who was to minister to their wants and necessities in their old home, certain portions of which were devoted to and reserved specially for their occupancy and use.

It would manifestly be unreasonable to hold that, after the defendant *Bostrak* had secured the title to this valuable farm, and the personal property transferred by the bill of sale, he might abandon the plaintiffs, and leave them to care for themselves as best they might, and still retain the property conveyed to him. The property so conveyed and transferred to the defendant was transferred and conveyed upon

a condition of substantial and faithful performance upon his part of the stipulations of the agreement in question. The written instruments, taken together, are upon a condition subsequent that the defendant should fairly and faithfully perform the terms and conditions of said agreement, and that he would support and care for the plaintiffs during their natural lives; and this care we must hold was intended to be personal on the part of their son, in whom they placed special trust and confidence. Instead of keeping faith with his aged father and mother, he virtually renounced his natural and covenanted duty to personally care for and support them, and practically abandoned them, failed to provide them with wood and water, and left them to care for themselves as best they might during the rigor of a long winter, and even drew away and deprived them of much of the fuel provided for their use. His failure to supply them with water suitable for use, or with the proper means to draw it from the well; his failure to keep their rooms in good condition, and to give any personal attention to his mother during her illness in the winter of 1896, or to go into her room in the house in which they all lived during that time, or to render her any personal assistance, and leaving them alone during the entire winter without sending any one to help take care of them; and his absolute refusal in March, 1897, to fulfill or perform in the future the contract he had made,—evinced in the clearest manner an utter and absolute disregard of his plain duty. Finally, he removed from the farm to another one he had purchased a few miles distant, so that he could give little or no aid to them when it might be most urgently required. These acts and omissions and others shown by the evidence indicate an utter renunciation of all duty and liability to perform or discharge his obligations to the plaintiffs under the contract or otherwise, and constitute, as we must hold, a breach of the defendant's contract of the most substantial character, requiring the exercise of the

powers possessed by courts of equity to redress such wrongs and grievances. We are unable to see how it can be maintained that there has been no such breach of contract as to entitle the plaintiffs to any relief, as contended by defendants' counsel, or to warrant an absolute dismissal of their complaint.

The printed case purports to contain all of the evidence, and we do not see anything to warrant the conclusion that the plaintiffs had waived their right to insist upon the performance of the contract in respect to the material and substantial matters indicated, or to any relief for a breach of its provisions. The action brought by the plaintiff *Mary Knutson* to foreclose the mortgage executed by the defendant to her was dismissed before the present action was instituted. The bringing of that action, and the dismissal thereof, was certainly no waiver of or bar to the present equitable action to obtain the relief thereby sought. The right of the plaintiffs to seek and have a rescission in equity of the contract, deed, and bill of sale as for a breach of condition subsequent still remained. The plaintiffs were not restricted or limited to an action for the foreclosure of either of the mortgages executed to secure the performance of the agreement, or the payment of the $2,000 note executed to the plaintiff *Mary Knutson.*

For the reasons stated, we think that the judgment appealed from dismissing the plaintiffs' complaint is erroneous, and must be reversed. The defendant Susan Cady and the defendant Stoughton State Bank do not appear to have answered the plaintiffs' complaint, or to have contested their right to the relief they have claimed, and the equities between the plaintiffs and these parties, whatever they may be, have not been determined.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to render judgment rescinding and setting aside the

said agreement, and the deed of conveyance and bill of sale executed under and in pursuance thereof, and granting the said plaintiffs restitution of said premises, and for such further or other relief as shall be according to law.

BLEILER, Respondent, vs. MOORE and another, Appellants.

April 16 — May 3, 1898.

Fraudulent conveyances: Evidence as to intent: Argument to jury.

1. A conveyance of property with intent on the part of the grantor, participated in by the grantee, to *delay* the creditors of the former, is fraudulent as to such creditors, and a refusal of the court so to charge the jury, when specially asked to do so, after having charged them that a conveyance made with intent to "hinder, delay, *and* defraud" creditors, and also that one made with intent to "hinder, delay, *or* defraud" creditors, would be void as to creditors, tends to mislead the jury and is therefore error.
2. In an action involving the question whether a conveyance was fraudulent, the party making it may testify to his intent, yet his testimony is not conclusive and does not necessarily outweigh the evidence of facts and circumstances tending to contradict it.
3. To allow counsel, in argument, to call the attention of the jury to the fact that his client was the principal witness in his own behalf and that the adverse party had not called witnesses to impeach his character for truth and veracity is not erroneous.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action of replevin. It has been here twice before. 88 Wis. 438, and 94 Wis. 385. The plaintiff claimed the property by virtue of chattel mortgages and a bill of sale from one William J. Bleiler, his son. The defendant *Moore* was the sheriff of Green county, and justified his seizure of the property by virtue of certain executions issued upon judgments against William J. Bleiler, and claimed

that the transfers of said property to the plaintiff were in fraud of said judgment creditors. The action was tried before a jury, and the defendants, among other instructions, requested the court to charge the jury as follows: (1) "A transfer would be void if the only intent existing on the part of the debtor, and participated in by the person to whom the transfer was made, was merely to delay his creditors in the collection of their just demands, although the debtor may intend ultimately to pay all of his creditors in full. And this is so for the reason that the time for the performance of a contract, both in morals and in law, is an essential part of the contract itself, and the right of creditors to receive their rights when due is as absolute as their right to receive them at all." (2) "While parties are allowed to testify as to the intent with which they did any act, such testimony is not conclusive, and does not necessarily outweigh the evidence of facts and circumstances tending to contradict such negative testimony." These instructions were refused, and the defendants excepted. A verdict was rendered for the plaintiff, and from the judgment thereon the defendants appeal.

For the appellants there was a brief by *J. D. Dunwiddie* and *B. F. Dunwiddie*, and oral argument by *B. F. Dunwiddie.*

J. M. Becker, for the respondent.

WINSLOW, J. The two instructions which were asked by the defendants, and which are given at length in the statement of facts, were correct legal propositions, and were plainly applicable to the case, and it was error to refuse them. The question in the case was whether the transfers of the property in question had been made by William to his father with intent to hinder, delay, *or* defraud his creditors, which intent was participated in by his father. In charging upon this question the court many times charged

in the conjunctive, stating, in effect, that in order to avoid the transfers they must have been made with intent to hinder, delay, *and* defraud creditors. It is true that in two or three instances he also used the word "or" instead of "and," but the manifest effect of the whole charge was inaccurate and misleading, and had a tendency to confuse the jury upon the question as to whether an intent to delay creditors, alone, would be sufficient to avoid the transfers. This inaccuracy might not be sufficient of itself to call for reversal of the judgment, had attention not been called to it in some way, and a proper instruction asked. *Greene & Button Co. v. Van Vechten*, 63 Wis. 16. But when the defendants specifically asked an instruction correcting the inaccuracy, and stating that an intent to delay creditors, alone, which was participated in by the grantee, was sufficient to avoid the transfers, it should certainly have been given in substance, and its refusal was error. The plaintiff had testified directly that he did not intend to hinder, delay, or defraud William's creditors. It is familiar law that, while such testimony is competent, it is not conclusive, and may be outweighed by collateral facts and circumstances which tend to throw light on the intent. The court nowhere charged the jury to this effect. The defendants asked for the instruction, it was applicable to the case, and it should have been given. A number of other instructions were asked by the defendants, but they were, in our judgment, sufficiently covered by the general charge, and we do not regard their refusal as ground for reversal.

The plaintiff was the principal witness in his own behalf upon the trial, and his testimony was necessarily attacked as untrue by the defendants' counsel in the final argument. In closing the case on behalf of the plaintiff, his counsel, in discussing the question of the credibility of the plaintiff's evidence, referred to the fact that the defendants had not called witnesses to impeach the plaintiff's character for truth

and veracity. This was objected to, but the line of argument was allowed by the court. We do not regard the ruling as erroneous. Some degree of latitude must be allowed counsel in the argument of a cause to a jury.

By the Court.— Judgment reversed, and action remanded for a new trial.

MARSHALL, J., dissents.

MELOY, Appellant, vs. PETERSON, Respondent.

April 16 — May 3, 1898.

Fraudulent representation as to quantity of land: Court and jury.

In an action to recover a part of the price paid to defendant for a farm, on the ground that the plaintiff was induced to buy and pay for the same as containing 110 acres, at a certain price per acre, by the false and fraudulent representations of the defendant that it contained that number of acres, *held*, that there was sufficient evidence of the fraud alleged to require the submission of the case to a jury; and that the acceptance of a deed, drawn in the precise terms of the contract, without knowledge of the facts, did not purge the transaction of fraud. *Ohlert v. Alderson*, 86 Wis. 433, distinguished.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

The complaint in this action alleges, in effect, that defendant was the owner of a certain tract of land; that in February, 1895, the plaintiff entered into an agreement with her to purchase the same for $48 per acre; that the defendant, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented that the tract contained 110 acres, well knowing that it contained less than 103 acres; that, pursuant to this agreement, a deed of said land was

in the conjunctive, stating, in effect, that in order to avoid the transfers they must have been made with intent to hinder, delay, *and* defraud creditors. It is true that in two or three instances he also used the word "or" instead of "and," but the manifest effect of the whole charge was inaccurate and misleading, and had a tendency to confuse the jury upon the question as to whether an intent to delay creditors, alone, would be sufficient to avoid the transfers. This inaccuracy might not be sufficient of itself to call for reversal of the judgment, had attention not been called to it in some way, and a proper instruction asked. *Greene & Button Co. v. Van Vechten*, 63 Wis. 16. But when the defendants specifically asked an instruction correcting the inaccuracy, and stating that an intent to delay creditors, alone, which was participated in by the grantee, was sufficient to avoid the transfers, it should certainly have been given in substance, and its refusal was error. The plaintiff had testified directly that he did not intend to hinder, delay, or defraud William's creditors. It is familiar law that, while such testimony is competent, it is not conclusive, and may be outweighed by collateral facts and circumstances which tend to throw light on the intent. The court nowhere charged the jury to this effect. The defendants asked for the instruction, it was applicable to the case, and it should have been given. A number of other instructions were asked by the defendants, but they were, in our judgment, sufficiently covered by the general charge, and we do not regard their refusal as ground for reversal.

The plaintiff was the principal witness in his own behalf upon the trial, and his testimony was necessarily attacked as untrue by the defendants' counsel in the final argument. In closing the case on behalf of the plaintiff, his counsel, in discussing the question of the credibility of the plaintiff's evidence, referred to the fact that the defendants had not called witnesses to impeach the plaintiff's character for truth

and veracity. This was objected to, but the line of argument was allowed by the court. We do not regard the ruling as erroneous. Some degree of latitude must be allowed counsel in the argument of a cause to a jury.

By the Court.— Judgment reversed, and action remanded for a new trial.

MARSHALL, J., dissents.

MELOY, Appellant, vs. PETERSON, Respondent.

April 16 — May 3, 1898.

Fraudulent representation as to quantity of land: Court and jury.

In an action to recover a part of the price paid to defendant for a farm, on the ground that the plaintiff was induced to buy and pay for the same as containing 110 acres, at a certain price per acre, by the false and fraudulent representations of the defendant that it contained that number of acres, *held*, that there was sufficient evidence of the fraud alleged to require the submission of the case to a jury; and that the acceptance of a deed, drawn in the precise terms of the contract, without knowledge of the facts, did not purge the transaction of fraud. *Ohlert v. Alderson*, 86 Wis. 433, distinguished.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

The complaint in this action alleges, in effect, that defendant was the owner of a certain tract of land; that in February, 1895, the plaintiff entered into an agreement with her to purchase the same for $48 per acre; that the defendant, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented that the tract contained 110 acres, well knowing that it contained less than 103 acres; that, pursuant to this agreement, a deed of said land was

made, and plaintiff then provided for the payment to the defendant of the sum of $5,280, being at the rate of $48 per acre for 110 acres; that the description in the deed was imperfect, so that it was impossible to ascertain therefrom the number of acres embraced therein; that plaintiff relied upon the representations made by defendant; and that, in fact, the said tract contained only 102½ acres of land; and she demands judgment for $360. The answer admits the agreement to purchase, the making of the deed, and alleges that the price agreed to be paid for the land was the sum of $5,280, for whatever land was so conveyed, and not otherwise, and denies the other allegations of the complaint. The action was brought to trial before a jury, and, at the close of plaintiff's testimony, the court granted a nonsuit. The plaintiff appeals from the judgment for costs.

For the appellant there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford.*

Gilbert E. Roe, for the respondent, argued that the contract was for the sale of a particular farm, the area of which might easily have been ascertained by the plaintiff. *Hackbarth v. Wollner*, 88 Wis. 476; *Docter v. Furch*, 76 id. 153; *S. C.* 91 id. 473; *Daly v. Brennan*, 87 id. 36. The executory contract to convey was performed and became merged in and superseded by the deed. *Clifton v. Jackson Iron Co.* 74 Mich. 183; *Slocum v. Bracy*, 55 Minn. 249; *Ohlert v. Alderson*, 86 Wis. 433.

BARDEEN, J. The only question for our consideration in this case is whether, under the proof offered by plaintiff, the court ought to have submitted the case to the jury. The court seems to have proceeded on the theory that the sale was of a known farm, of a "lump quantity," for a definite gross sum. If it was, then the court was right. If not, then the case should have been submitted to the jury.

The sale was negotiated through defendant's agent, Main.

As a witness for plaintiff, he testified that he saw the defendant about the farm; that she told him she had 110 acres, and had got to have $48 per acre for it. Main saw plaintiff's husband, who was acting as her agent, and told him that he had the farm for sale,—110 acres, at $48 per acre. Plaintiff and her husband went to look at the place, and, while there, a justice was called in, and a contract was written out, signed, and delivered. With reference to the contract, Mr. Main testified: "It called for 110 acres of land, to be conveyed, at $48 per acre;" and again: "And the consideration we put in the contract was 110 acres, at $48 per acre,—$5,280." Mr. Meloy testified: "The contract said 110 acres, both in writing and figures, and at $48 an acre, and the amount $5,280;" and that it was suggested by both defendant and Mr. Main to put in the contract that there was 110 acres in the farm. Mr. Scholtz, the justice who drew the contract, said: "The contract claimed that there was 110 acres being sold, at $48 an acre, amounting to $5,280." There can be no doubt, from this testimony, that the contract between the parties called for 110 acres of land, at $48 per acre. It seems that, some time after the deal had been closed, Mr. Main had some talk with defendant; and, after the trouble had commenced, she told him she knew there was not 110 acres in the farm; but she would not sell it for any less, because they had bought for that amount. While the contract was being drawn, Meloy had the impression that the purchase price was $4,800, having made a mistake in figuring. He then said to defendant, "How do I know whether we are getting 110 acres or not?" And she said there was 110 acres, and "they bought it for 110 acres." All the witnesses agree that the quantity of land was talked over, and the price per acre was put in the contract.

A plat of the land drawn from the description in the deed shows that it was of irregular shape, and that it would be quite impossible from a mere inspection of the farm for an

ordinary person to form any estimate of the number of acres it contained. The mere inspection of the land could not, therefore, have put plaintiff on her guard as to the quantity of land conveyed by the deed.

There can be little doubt, under this testimony, but that defendant made express representations as to the quantity of land sold. The fact that she told Mr. Main subsequently that she knew there was not 110 acres of land in the tract is a circumstance tending to show fraud. Construing the testimony, as we must, most favorably to plaintiff, we have then this state of facts: An express representation that there was 110 acres of this land; reliance by plaintiff upon such representation; proof that there was only about 103 acres; knowledge by defendant that such representation was false. Unless it can be said that the contract so made became merged in the deed, and beyond which the plaintiff cannot go, it is evident the plaintiff would be entitled to submit her case to the jury.

It will be observed that the complaint charges that the representations as to the quantity of land were made with the *fraudulent intent* to induce plaintiff to purchase the same and pay the price agreed. The proof alluded to tends to support these allegations. Unlike the case of *Ohlert v. Alderson*, 86 Wis. 433, the parol evidence offered was not offered here to dispute the contract between the parties, or to show a parol agreement antecedent to the written contract, but rather to establish the contract as originally made. In that case no question of fraud was raised, and there was no claim that the contract or the deed contained any mention of the quantity of land conveyed or the price per acre. Here the contract as originally made is asserted; but it is claimed that plaintiff was induced to make this contract by the false representations that there was 110 acres of this land, and, relying upon them, she accepted the deed, supposing that it conveyed that number of acres. It is a fair inference from,

although not clearly set forth in, the evidence, that plaintiff did not know she was not getting the full 110 acres of land until some time after the deed was executed. The deed itself does not mention the number of acres conveyed; and it is impossible for the ordinary layman to compute the amount from the description given. Generally speaking, the delivery and acceptance of a conveyance cancels and extinguishes the prior executory agreement, as is substantially held in *Ohlert v. Alderson, supra; Smith v. Evans*, 6 Bin. 102; *Williams v. Hathaway*, 19 Pick. 387; *Slocum v. Bracy*, 55 Minn. 249. But this rule is subject to important exceptions. In *Witbeck v. Waine*, 16 N. Y. 532, it was held that the execution and delivery of a deed pursuant to an executory contract for the sale of land did not extinguish a provision therein for an increase or rebate of the purchase price in proportion to the excess or deficiency which might exist in the land, although the deed was silent on the subject. So, in another case it is said that the conveyance did not extinguish a stipulation in the contract that the vendor should retain possession of the premises beyond the period when the conveyance was made. *Morris v. Whitcher*, 20 N. Y. 41. These exceptions are mentioned to show that the rule is not entirely universal.

If it be admitted that the evidence shows that the plaintiff was induced to make the contract to pay for 110 acres of land upon the false representation that there was that number of acres, and that she did not know that it was short when she took her deed, this element of misrepresentation survived the delivery of the deed, and remains as potential to her as though no deed had been given. The alleged fraud consists in the representation which induced her to contract for, and thereafter to pay for, more land than she actually received. *Brooks v. Riding*, 46 Ind. 15, is a case clearly in point. Plaintiff represented that a lot he desired to sell was fifty-five feet wide. Defendant did not know the width of

the lot, although he had examined it, but made the purchase in reliance upon such representation. It was held that he might defend as to so much of the purchase price as the evidence showed there was a shortage in the lot. This principle is recognized, although relief was denied on the facts, in *Weart v. Rose*, 16 N. J. Eq. 290, and *Ketchum v. Stout*, 20 Ohio, 453.

Suppose, in this case, no deed had been given, and defendant was here seeking to enforce the contract. Could it be claimed for an instant that defendant could compel specific performance, if it were shown, as is here claimed, that the contract was induced by false representations? How is the situation altered when plaintiff accepts a conveyance of the land she has agreed to buy, laboring under the same delusion as when she made the contract. If it was fraudulent to represent that there was more land than there really was, does the giving of a deed according to the precise terms of the contract purge the transaction of the fraud? Just why or how the act of giving the deed possesses any such alchemistic power is not easily seen. The original taint of fraud surrounds and possesses the deal through all its different stages, until the defendant, with *knowledge* of the situation, does something that will estop her from claiming the fraud. If the transaction reaches final culmination before any discovery is made, certainly she is not robbed of her remedy. Under well-recognized rules of law, she might have rescinded the contract, or sought redress for the damages sustained. She has chosen the latter remedy. The taint in the original contract inheres in and permeates the whole transaction. Had she accepted the deed with full knowledge, no such question could arise. Under all the canons of the law, her remedy would have been gone. So long as we can say that the evidence tends to prove that the purchase was by the acre, and not of a given tract or known farm; that plaintiff was induced to make her contract to pay for 110 acres of

land by the false representation of the defendant; that the quantity was short, the plaintiff supposing that she was getting in the deed the full amount contracted for,— the mere making and delivery of the deed will not purge the transaction of its injurious effects. Plaintiff is not disputing either the contract or the deed. She is simply attacking the *bona fides* of the representations which induced her to pay for more land than she really got. Under these circumstances, we think there was sufficient evidence in the case to warrant the court, under proper instructions, in submitting the case to the jury.

By the Court.— The judgment of the circuit court is reversed. and the cause remanded for a new trial.

GULDEMANN, Appellant, vs. LERDALL, Respondent.

April 16 — May 3, 1898.

Appeal, review on: Discharge in insolvency.

1. An order of court, dissolving an injunction by which the enforcement of a foreign judgment was restrained pending proceedings for the discharge of the defendant as an insolvent debtor, cannot be reviewed on appeal if the record contains neither the evidence nor the pleadings and papers on which such order was based.
2. Our law relating to assignments by insolvent debtors and their discharge (ch. 334, Laws of 1897) cannot operate to vacate judgments, nor to dissolve attachments, levies, or garnishments, in the courts of other states.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The facts of the case are stated in the opinion.

For the appellant the cause was submitted on the brief of *Fehlandt & Whelan.*

For the respondent there was a brief by *Buell & Hanks,* and oral argument by *C. E. Buell.*

CASSODAY, C. J. It appears from the record that, at the times mentioned, the plaintiff resided in Dane county; that he was working in Chicago; that April 22, 1897, the defendant held a note against him for $134.13, and sent the same to Chicago for collection; that suit was brought thereon, and a judgment of $138.88 was recovered thereon before a justice of the peace; that June 19, 1897, the plaintiff filed his verified petition in the circuit court for Dane county for a discharge from his debts in pursuance of the statutes (R. S. 1878, secs. 4282–4306); that in such petition he stated under oath that he had no property of any kind, except household furniture to the amount of $200, which he claimed as exempt; that thereupon the court ordered his creditors to show cause, if any, September 20, 1897, why he should not be discharged from his debts, and due notice thereof was given; that July 30, 1897, upon affidavit and all the papers and proceedings in the matter, a court commissioner of said county made an order restraining the defendant from proceeding further with the collection of that judgment in Chicago; that August 10, 1897, upon affidavits and the records therein, the circuit court dissolved and set aside said injunctional order, with costs. From that order, the plaintiff brings this appeal.

There is nothing in the record showing when the judgment was recovered in Chicago, nor when execution was issued thereon, nor whether any property of the plaintiff had been seized by virtue of such execution, much less that any exempt property had been seized or threatened to be seized thereon. There is nothing to show upon what papers or evidence the trial court based the order appealed from, aside from the two affidavits mentioned. Such being the state of the record, this court cannot say that there was any error in making the order appealed from, even if it were conceded that the plaintiff had no adequate remedy at law. But we perceive no reason why he did not have an adequate

remedy at law. Laws of 1897, ch. 334, cited by counsel, could not operate to vacate judgments, nor to dissolve attachments, levies, or garnishments, in the courts of other states.

By the Court.— The order of the circuit court is affirmed.

WOOD, Respondent, vs. PRUSSIAN NATIONAL INSURANCE COMPANY, Appellant.

April 16 — May 3, 1898.

Insurance: Agreement by agent to keep policy renewed.

An oral agreement by an insurance agent with a person to whom he is issuing a policy that he will never suffer the insurance to lapse, but will give notice when it is about to lapse, and will renew the insurance either in the same or in some other company represented by him, is not binding upon the company which issued such policy, unless the agent was acting within his actual or apparent authority for such company and it was so understood by the insured, or the contract was afterward ratified. It is the contract of the agent in his personal capacity.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action for damages for failure to renew a policy of fire insurance by the defendant company, pursuant to an alleged oral agreement to do so. The question raised by the pleadings, upon which the case turned, is, Was the alleged oral agreement made between plaintiff and defendant acting by its authorized agent, or by plaintiff and such agent acting in his own behalf? The cause was tried by the court without a jury, and resulted in findings and conclusions respecting the disputed question referred to, in substance, as follows:

(1) January 20, 1896, and during all the times referred to in the findings, A. W. Dibble was the duly-authorized agent

of the defendant and other insurance companies doing business in the state of Wisconsin.

(2) January 5, 1894, such agent insured the property described in the complaint for $500 for the term of one year. Before and after the issuing of the policy, it was agreed between plaintiff and defendant, acting by such agent, that upon the expiration thereof defendant should issue a new policy in its place on the same terms and conditions, and without notice to plaintiff, and should thereafter, from year to year, keep up such insurance, subject, however, to its right to cancel any policy on giving due notice thereof, so as to enable plaintiff to obtain other insurance.

(3) Pursuant to such agreement, January 5, 1895, the policy issued as aforesaid was renewed by defendant, but when such second policy expired, though defendant was willing to renew it, by mistake of its agent the renewal policy was not issued, or any notice given to plaintiff so he could obtain other insurance, and by reason thereof, and the destruction of the property by fire January 20, 1896, plaintiff was damaged in the sum of $500.

(4) The regular course of business of the defendant and its agent, from a time prior to January 5, 1894, was to renew insurance upon buildings owned by plaintiff, without notice to him of intention so to do, and without directions from him in regard thereto, the same being done pursuant to the agreement aforesaid, that plaintiff's insurance should not be allowed to expire without renewals, unless one of the parties to the agreement should give notice to the other, and plaintiff relied on such agreement, which was to continue until terminated by notice of one of the parties to the other of a discontinuance thereof.

From the foregoing the court concluded as a matter of law that a binding agreement was made between plaintiff and defendant, requiring the latter, without notice to the former, to renew the policy expiring January 5, 1896, and

that by failure so to do it became liable to plaintiff for the loss of his property by fire, to the amount of $500, the same as if a policy had been duly issued as agreed upon. Exceptions were taken to the findings of fact as not supported by the evidence. Defendant appealed from the judgment which was entered in accordance with the determination aforesaid.

H. W. Chynoweth, for the appellant.

For the respondent there was a brief by *Jones & Stevens*, and oral argument by *B. W. Jones*. To the point that there was a complete contract to reinsure, and that an oral contract to renew or to reinsure was binding upon the company, they cited *King v. Hekla F. Ins. Co.* 58 Wis. 508; *Stehlick v. Milwaukee M. Ins. Co.* 87 id. 322; *Campbell v. American F. Ins. Co.* 73 id. 100; *Zell v. Herman F. M. Ins. Co.* 75 id. 521; *Scott v. Home Ins. Co.* 53 id. 238; *Ellis v. Albany City F. Ins. Co.* 50 N. Y. 402; *Baker v. Comm. U. Ass. Co.* 162 Mass. 358; *Trustees of First Baptist Church v. Brooklyn F. Ins. Co.* 19 N. Y. 305; *John R. Davis Lumber Co. v. Scottish U. & N. Ins. Co.* 94 Wis. 472; *N. W. Iron Co. v. Ætna Ins. Co.* 23 id. 160.

MARSHALL, J. The sole question for consideration is, Does the evidence warrant the findings of the trial court that an oral agreement was made between plaintiff and defendant, whereby the latter became bound to keep plaintiff's property, described in the policy of January 5, 1894, insured for $500 on the terms and conditions mentioned therein, till released therefrom by plaintiff, or by reasonable notice to him by defendant of an intention to discontinue such insurance? Such findings are based on the evidence of plaintiff and A. W. Dibble, defendant's agent, that some time in 1893 they entered into an agreement to the effect that Dibble, who was agent for several insurance companies, should look after such insurance as plaintiff might elect to place with him and not allow any policies to expire in his hands with-

out a renewal thereof in the same or some other company. Plaintiff testified in language substantially as follows: I stated to Dibble I wanted it distinctly understood that he would never allow a policy to lapse in his hands; that as soon as they expired I wanted him to rewrite them; that if the company he was writing for objected to renewing the insurance, he should let me know immediately or place the insurance in another company. He said he would do so. Dibble testified in language substantially as follows: He was to give me a line of insurance and I was to keep the policies renewed in such companies as we should agree upon, and not to allow any policy to lapse without notice from either one side or the other. The evidence given further was to the effect that Dibble placed $500 of insurance on the property described, in the defendant company, January 5, 1894, pursuant to the aforesaid agreement, and renewed such insurance January 5, 1895, and that by oversight on his part he failed to renew the same January 5, 1896, or to keep the insurance alive in any other manner, and that no notice was given by either side to terminate such arrangement.

The evidence mentioned in the foregoing shows clearly what occurred between plaintiff and Dibble, upon which the court found that there was a contract made between plaintiff and defendant, binding upon the latter, to renew the policy issued January 5, 1895, or seasonably to notify plaintiff to the contrary, or place the insurance in some other company. It is not claimed that the contract, when made, specified any particular company or companies that should carry the insurance, or that it was other than an agreement to the effect that the agent, Dibble, would keep such insurance alive as plaintiff would place in his agency, till the termination of the arrangement between them upon reasonable notice of one side to the other.

It has been repeatedly held by this and other courts, and

is elementary, that a binding oral contract of insurance may be made by an insurance company acting through its authorized agent, without payment of premium, issuance of policy, or report to the company. *John R. Davis Lumber Co. v. Scottish U. & N. Ins. Co.* 94 Wis. 472. No time need be spent on that subject, if it may be said that the question is involved in this case. Suffice it to say that such a contract, to be binding, requires a meeting of minds as to all its material provisions, leaving nothing to be done but to execute it. Was there any such meeting of minds as to the contract in question, or any meeting of minds at all, to which the defendant was a party? There is the turning point of this case.

One of the essential requisites to bind a person as principal, in a contract alleged to have been made by him through an agent, is that it be shown that such agent acted within the scope of his actual or apparent authority for such principal, so understood by the other party to the contract. Unless it be shown that there was a meeting of minds on that point, either at the time of the making of the contract, or by subsequent ratification with knowledge of the facts, then the essential element to make a binding contract is wanting. *McDermott v. Jackson*, 97 Wis. 64. If the agent acts in his own behalf, though in the line of his employment for the principal, and the other party deals with him in his personal capacity, the principal is a stranger to the transaction and no more bound by it than if the relation of principal and agent did not exist between them at all.

In the light of the foregoing we have studied the record on this appeal in vain for evidence tending to show that the agent, Dibble, acted for defendant in making the contract with plaintiff to keep his insurance alive. All the direct evidence shows clearly that the arrangement was made by the agent in his own behalf, and that the duties he assumed were those of an agent for plaintiff solely. Not only that, but the terms of the contract and the nature of

the duties it imposed on Dibble are all inconsistent with any reasonable theory that he made the contract as agent for defendant, or that defendant became a party to it. It was stipulated that if, on the expiration of any policy, the agent was not able to renew it in the same company, he was to place the insurance in some other company or seasonably notify plaintiff. It will hardly be claimed that plaintiff and Dibble, or either of them, intended that defendant should be bound, on the expiration of any policy issued by it, to replace the insurance in some other company, in any event. The trust in that regard was obviously reposed in Dibble as plaintiff's agent; yet the contract was entire, so that if defendant was bound by any part, it was bound by all. As another very significant and persuasive circumstance, we note that according to Dibble's testimony, one of the provisions of the contract was that no policy should be allowed to lapse *without notice from either one side or the other.* As the companies had not then been designated, in which the line of insurance plaintiff purposed giving to Dibble would be placed, clearly, the two sides of the agreement were plaintiff and Dibble.

It is needless to continue the discussion, the question being simply one of fact, as to whether the agent Dibble made the alleged contract as agent for the defendant. The conclusion here reached is that there is no evidence in the record to show that defendant was a party to the alleged transaction, either originally or by subsequent ratification, or that such transaction was other than purely a contract between plaintiff and the agent acting in his individual, not representative, capacity. Therefore, the judgment must be reversed, and the cause remanded with directions to dismiss the complaint.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the complaint and render judgment in favor of the defendant for costs, to be taxed according to law.

THE STATE EX REL. GOEBEL, Appellant, vs. CHAMBERLAIN, County Treasurer, Respondent.

April 16—May 3, 1898.

Delinquent tax list, publication of in English newspaper.

Although secs. 1130, 1131, S. & B. Ann. Stats., merely require that the delinquent tax list shall be published in a newspaper which has been published continuously for two years, and though the county board are authorized by sec. 675 to order its publication in a newspaper published in any other than the English language, when they shall deem it necessary, provided twenty-five per cent. of the population of that county are of a nationality not speaking the English language and have a newspaper published in their own language, yet that statute required such notices also to be published in a newspaper "published in the English language as provided by law;" and in the absence of any order by the county board, the publication of such list in a German newspaper, though in the English language, is not legal, and such paper, though making the lowest bid, is not entitled to the contract. *Wakeley v. Nicholas*, 16 Wis. 588, and *Kellogg v. Oshkosh*, 14 Wis. 623, distinguished.

APPEAL from an order of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an appeal by *Edward Goebel* from an order of the circuit court for Langlade county denying the writ of *mandamus* prayed for in said relator's petition.

The petition stated, in substance, that said relator was the proprietor, editor, and publisher of the Antigo Herold, a German weekly newspaper printed and published at the city of Antigo, in Langlade county; that said paper had been regularly and continuously published in said county for more than six years then last past, and still continued to be so published; that March 25, 1897, the number of descriptions in the list of lands to be advertised for sale by the county treasurer for the year 1896 for taxes exceeded 4,000; that the respondent, *S. W. Chamberlain*, then county treasurer

of said county and acting as such, March 25, 1897, delivered to and left with the relator a printed notice, notifying him, in substance, that the number of descriptions of lands to be advertised for sale for the nonpayment of taxes for the year 1896 exceeded 4,000, and that he would let by contract the publication of the list to the lowest bidder, at his office in the court house in the city of Antigo, in said county, on April 6, 1897, at 10 o'clock in the forenoon, and that all publishers proposing to bid on such publication must comply strictly with the provisions of law concerning the same, and that no bids would be considered which failed so to do; that on the same day said *Chamberlain* delivered to and left with each and all the editors and publishers of papers in said county qualified to publish said tax list a similar notice; that thereafter, and prior to the time of opening said bids and letting of the contract, the said relator, as editor and publisher of the Antigo Herold, delivered to and left with the said county treasurer his bid, duly signed and sealed as by law required, agreeing to publish said list in the English language in said Antigo Herold for the sum of eighteen cents for each and every description in said list contained, and at the same time, accompanying said bid, was said relator's bond for $5,000, duly executed as provided by statute, conditioned, among other things, that the work would be properly performed, and signed by five sureties, who each justified in the sum of $2,000.

It was further alleged that the only other bid for said work was one made by John A. Ogden, editor and publisher of the Antigo Republican, who agreed to print and publish said list for twenty-five cents for each and every description therein, and these were the only bids submitted to said county treasurer; that, although the bid of the relator was the lowest, said county treasurer, *S. W. Chamberlain*, refused to act upon and accept said bid, and refused to award the publishing of said list to the relator, solely for the reason

that the said Antigo Herold was a newspaper printed in the German language, and publishing said list in the English language in said paper would not be a legal publication; and that he still refused to award said relator said contract. Wherefore he prayed that a peremptory writ of *mandamus* might issue out of, and under the seal of, the court, requiring and commanding said *S. W. Chamberlain*, county treasurer aforesaid, to award said contract to the relator in accordance with his said bid.

An alternative writ was issued as prayed, to which the respondent, in answer, alleged that the Antigo Herold was a newspaper printed and published in the German language, and not, in law, in the absence of the proper action of the county board of said county, authorized to bid, contract for, or publish said list, and prayed that the peremptory writ asked for be denied. Said matter coming on to be heard by the court upon argument, the court made an order that the writ prayed for be denied, without costs, from which order the relator appealed.

T. W. Hogan, for the appellant.

For the respondent the cause was submitted on the brief of *Jno. E. Martin.*

PINNEY, J. The question to be determined is whether, under the statute, a delinquent county tax list can be lawfully published in a German newspaper, in the English language, if the newspaper is in every other respect lawfully qualified as a means of making such publication.

Sec. 1130, S. & B. Ann. Stats., requires the county treasurer, on the first Monday of April in each year, to "make out a statement of all lands upon which the taxes have been returned as delinquent and which then remain unpaid, except public lands held on contract and lands mortgaged to the state, containing a brief description thereof, with an accompanying notice stating that so much of each tract or

parcel of land described in said statement as may be necessary therefor, will on the third Tuesday of May next thereafter, and the next succeeding days, be sold by him at public auction, at some public place, naming the same, at the seat of justice of the county, for the payment of taxes, interest and charges thereon; and if in any county no seat of justice shall be established, then at such public place therein as he may select; and cause such statement and notice to be published in *a newspaper* printed in his county, if there be one, . . . which statement and notice shall in all cases be published once in each week, for four successive weeks prior to said third Tuesday of May; . . . but it shall be unlawful for any county treasurer to publish such statement and notice in any newspaper in his county that has not been regularly and continuously published in such county once in each calendar week for at least two years immediately before the date of such notice, if there be a newspaper which has been so published in such county;" and any county treasurer violating the provisions of this section is subject to a specified forfeiture. The statute thus defines, in one respect, what shall constitute a legal newspaper for the publication of such statement and notice.

Sec. 1131 provides that "in every county where the number of the descriptions in the list of lands to be advertised for sale for the nonpayment of taxes by the county treasurer shall exceed four thousand, the county treasurer shall let by contract the publication of such list to the lowest bidder, upon a notice written or printed, to be delivered to and left with the publisher or one of the publishers of each newspaper in his county, at least ten days prior to the time at which such contract shall be let; but no such contract shall be made to publish such list in any newspaper which has not been regularly and continuously published once in each week in such county for at least two years prior to the time at which such publication shall be by law re-

quired to be made, unless there be no such newspaper so published in such county." It will be observed that the statute uses the words "*a newspaper*," without limiting it to any particular kind of newspaper, either German or English. The only express qualification is that the paper must have been regularly and continuously published once in each week in such county for at least two years prior.

By sec. 675 it is provided that "the county board may order public notices relating to tax sales, redemption and other affairs of the county, to be published in a newspaper, printed in any other than the English language, to be designated in such order, whenever they *shall deem it necessary* for the better information of the inhabitants thereof, *and it shall appear* from the last previous census that one fourth or more of the adult population of such county are of a nationality not speaking the English language, and that there shall have been a newspaper published therein continuously for one year or more in the language spoken by such nationality; provided, that all such notices shall *also* be published in a newspaper published in the English language *as provided by law.* The compensation for all such publications shall be paid by the county ordering the same, and shall be the same as that prescribed by law for publication in the English language; and no extra charge shall be allowed for translation in any case."

The power of the county board to make the order is discretionary, and it must appear from the last previous census that one fourth or more of the adult population of such county are of a nationality not speaking the English language, and that there shall have been a newspaper published therein for one year or more in the language spoken by such nationality; and it is also made necessary that "all such notices shall also be published in a newspaper published in the English language, as provided by law." Sec. 1130,

S. & B. Ann. Stats., authorizes the county treasurer to use his discretion in selecting the newspaper in which he shall publish the delinquent tax list if the number of descriptions is less than 4,000, but requires him to let the printing of it to the lowest bidder when it exceeds 4,000 descriptions. He has in such case no discretion. He is required to notify each newspaper in the county to file bids; that is to say, each newspaper qualified to make such publication. The statute, when construed in the light of the common law, invites bids from only qualified newspapers, and a paper printed in the German language is not within the statute.

In *Kellogg v. Oshkosh*, 14 Wis. 623, the common council, under the charter (sec. 9, subch. III, ch. 133, P. & L. Laws of 1856), had power to designate a newspaper *printed in the German language* as the official paper of the city; and it was held that the notice required by sec. 9, subch. VIII, and published in such paper, was valid, if also published in the English language. Also, in *Wakeley v. Nicholas*, 16 Wis. 588, it was held that the publication of a summons in a German newspaper, in the English language, was a legal publication. In that case the person to be served was an American, and the officer making the order for its publication directed that it be published in a German newspaper, to wit, the Wisconsin Zeitung, published at Madison, and the summons was published therein in the English language. The court held it was a sufficient publication, and the officer granting the order had a discretion to determine in what paper it should be published. DIXON, C. J., rendering the opinion of the court, says: "Upon affidavit, as prescribed by statute, the court, or a judge thereof, or a court commissioner, may grant an order that the service of the summons be made by publication. R. S. [1858] ch. 124, sec. 10. If the circuit judge who granted the order in this case, in the exercise of the *discretion* vested in him by the statute, di-

rected publication in a German, instead of an English, newspaper, as being most likely to give notice to the person intended to be served, we see no legal objection to it."

The present case is clearly distinguishable from the cases cited, in that in this case the county treasurer had no power or discretion to receive relator's bid, or award him a contract under it. No authority had been given to him by the county board for that purpose under sec. 675, R. S. 1878. The English language is the language of the country, to be used in all legal and official notifications or proceedings, in the absence of any statute authority to the contrary. It does not appear that the county board had considered or acted upon the subject. We hold that this section is decisive against the validity of the relator's claim, under his bid, to the contract. The publication of said list in the English language in a German paper would not, for the reasons stated, in the absence of such authority, be a legal publication; and the county treasurer rightfully refused to award to the relator a contract for that purpose, upon his bid.

It follows from these views that the order appealed from, denying the writ of *mandamus* prayed for, is correct and must be affirmed.

By the Court.—The order of the circuit court appealed from is affirmed.

BODAH, Appellant, vs. THE TOWN OF DEER CREEK, Respondent.

99 509
59 LRA 249n

April 16—May 3, 1898.

Highways, liability for defects: Pleading.

1. A complaint in an action for damages claimed to have been caused by the unsafe condition of a highway, which merely describes such highway as a graded way, not to exceed nine and one-half feet wide on the surface, with an unfenced or unguarded ditch about two and one-half feet deep on each side, and alleges that, while

traveling on such highway with a loaded sleigh drawn by horses, the sleigh with its load slued into the ditch on one side, whereby it was overturned, causing the injuries complained of, does not state a cause of action, because it does not charge that the alleged defective condition of the road was the cause of the accident or had anything to do with it.

2. *It seems* that an ordinary turnpike road, constructed as they generally are through low lands, which is nine and one-half feet wide at the surface and slopes at each side to a ditch whose bottom is two and one-half feet below such surface, comes up to the standard of reasonable safety, which is the limit of the duty the public owes to a traveler.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover damages alleged to have been caused to plaintiff by the unsafe condition of a public highway in the defendant town. Defendant's counsel objected to any evidence under the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The objection was sustained, and, no request being made for leave to amend, judgment was entered dismissing the action, and for costs in defendant's favor. Plaintiff appealed from such judgment.

F. C. Weed, for the appellant, argued that a highway graded up so as to be only nine and one-half feet wide on top, with an unguarded ditch on each side, was not, as a matter of law, a legal highway, but a jury might properly find it defective. *Carville v. Westford*, 163 Mass. 544; *Simons v. Casco*, 105 Mich. 588; *Prideaux v. Mineral Point*, 43 Wis. 513; *Seymer v. Lake*, 66 id. 651; *Sharp v. Evergreen*, 67 Mich. 443; *Hein v. Fairchild*, 87 Wis. 258.

John Bottensek, for the respondent.

MARSHALL, J. The alleged defective highway was described as a graded way about forty rods long, not to exceed nine and one-half feet wide on the surface, with a ditch or gully about two and one-half feet deep on each side, and no

guard or railing to prevent vehicles, wagons, or sleighs from leaving the surface and sliding into one of the side ditches. The allegation as to the occasion of the injury is, in substance, that as plaintiff was traveling on the highway with a team of horses and sleigh loaded with logs, on which he was standing, the sleigh, with its load, slued into the ditch on the south side of the road, whereby it was overturned, causing the injuries complained of. There is no allegation that the alleged defective character of the road was the cause of the accident, or had any connection therewith.

From the description of the highway, no other reasonable inference can be drawn than that it was an ordinary turnpike road, constructed, as they generally are, through low and flat lands in country districts. The reasonable inference is that the surface of the road, nine and one-half feet wide, sloped on each side to the bottom of a gully about two and one-half feet below such surface. That such an ordinary turnpike comes up to the standard of reasonable safety, which is the limit of duty due to travelers from the public corporation, will hardly admit of serious controversy. Moreover, there being no claim in the complaint that the alleged defective condition of the road caused the sleigh to slide into the ditch, clearly no cause of action is stated. As this court has often been called upon to say, mere breach of a duty which one person owes to another respecting his personal safety, and an injury to such other, do not constitute actionable negligence; there is still needed the element that the breach of duty, in a line of responsible causation, was the cause which produced the injury; and the facts in that regard must be alleged in the complaint, established by evidence, and found by the jury, else there can be no recovery.

It follows that the ruling of the trial court, sustaining the objection to any evidence under the complaint, was right, and the judgment appealed from must be affirmed.

By the Court.—Judgment affirmed.

99 512
102 234

99 512
111 669

RICHTER, County Judge, Respondent, vs. LEIBY and others, Appellants.

April 18—May 3, 1898.

County judge: Estates of decedents: Action by creditors to reach assets not inventoried: Parties.

1. Under the provisions of sec. 3835, R. S. 1878, authorizing any creditor of an estate whose claim has been allowed, whenever there is just reason to apprehend that such estate as inventoried may be insufficient to pay the debts, to bring an action in the circuit court on behalf of all the creditors, to reach and subject to sale any real estate or other assets not inventoried, which, according to law, ought to be subjected to the payment of such debts, such an action may be brought and maintained by a creditor whose claim has been allowed, notwithstanding an appeal has been taken from the allowance thereof.
2. The maintenance of such action in the circuit court is not affected by sec. 4036, R. S. 1878, which refers only to proceedings in the county court and the effect of an appeal therein. The action in the circuit court is ancillary to the proceedings in the county court, is in favor of all the creditors, and does not depend upon any single judgment rendered in the county court, and cannot, under sec. 3836, R. S. 1878, be brought to trial until the sufficiency or insufficiency of the assets has been determined, but may be held and maintained in the meantime.
3. A county judge who, in pursuance of sec. 4015, R. S. 1878, has presented a claim upon a bond, given in an estate which is being administered in his own county, for allowance in proceedings for the administration of the estate of one of the sureties therein in the county court of another county, and had it allowed, is a creditor of that estate, who may maintain an action under sec. 3835, R. S. 1878, notwithstanding sec. 4015 provides that the judgment in the action shall specify the amount found due to each particular person for whose benefit it is brought. He stands in the relation of trustee of an express trust, and the suit should be in his name and not in that of the beneficiaries whom he represents.

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The plaintiff brings this action in his capacity as county judge of Fond du Lac county, based upon the following state

of facts: One Wroe was a trustee of an estate being administered in that county and Jonathan Leiby was one of his sureties. Wroe defaulted, and the sureties became liable on their bond. Leiby died, and the plaintiff, as county judge, filed a claim against his estate for the amount of Wroe's defalcation, in the county court of Outagamie county, which, after a contest, was allowed at the sum of $9,258. Plaintiff then brought this action, in the nature of a creditor's bill, under sec. 3835, R. S. 1878, to set aside a deed of his real estate alleged to have been made by Leiby, in his lifetime, to escape the payment of his liability on this claim. The transaction had been so manipulated that the title to the property came to the defendant *Abigail Leiby*, who is the widow and administratrix of Jonathan Leiby, and was by her conveyed to the defendants *Zuehlkes*, who are alleged to have had full knowledge of the situation. To secure part payment of the purchase money of this land, the *Zuehlkes* executed a mortgage on the land to *Mrs. Leiby*.

The complaint shows that Leiby's estate did not possess sufficient assets to pay the plaintiff's claim, and it is sought therein to secure the land so fraudulently conveyed or, failing in that, the amount of the purchase money unpaid, represented by the mortgage mentioned. The plaintiff obtained an injunction restraining the defendant *Abigail* from collecting and the *Zuehlkes* from paying the mortgage pending the suit. The defendants separately demurred to the complaint on the grounds that plaintiff had no legal capacity to sue, and that the complaint did not state facts sufficient to constitute a cause of action. Afterwards the defendant *Abigail Leiby*, in her personal capacity, and the *Zuelhkes*, moved to dissolve the injunction, based upon an affidavit showing that *Mrs. Leiby*, as administratrix, had appealed from the allowance of the claim represented by the plaintiff to the circuit court, and that such appeal was pending and undetermined, said appeal having been taken before the com-

mencement of this suit. From an order denying said motion, said defendants appeal.

For the appellants there was a brief by *Lyman E. Barnes, Bottensek & Coates*, and *Frank W. Harriman*, and oral argument by *Lyman E. Barnes*. They argued, *inter alia*, that the plaintiff's claim has not been allowed by the county court, within the meaning of sec. 3835, R. S. 1878, so as to give him a right to prosecute this action. The effect of the appeal from its allowance with a stay of proceedings is, by sec. 4036, R. S. 1878, not merely to suspend but to render entirely inoperative the order or judgment appealed from, during the pendency of the appeal. *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265, 272; *York v. Orton*, 65 id. 6; *Neumann v. State*, 76 id. 112; *Smith v. Schreiner*, 86 id. 19; *Day v. DeJouge*, 66 Mich. 550; *People v. Treadwell*, 66 Cal. 400; *Bullard v. McArdle*, 98 id. 355–359; *Curtiss v. Beardsley*, 15 Conn. 518; *Howland v. Couch*, 43 id. 50; *Card v. Foot*, 57 id. 427. The plaintiff is not the real party in interest and has no legal capacity to sue. The action is not on a bond, such as might be brought by him as county judge, under secs. 4014, 4015, R. S. 1878, but it is one in the nature of a creditors' bill. The judgment of the county court upon the claim presented by him must, under sec. 4015, R. S. 1878, specify the amount found due for each particular person for whose benefit the action is brought, and it is not therefore in favor of the county judge, but of the party to be benefited. *Meyer v. Barth*, 97 Wis. 352. The complaint does not show that the estate of the deceased surety was rendered insolvent by the conveyance alleged to be fraudulent, so as to entitle the plaintiff to equitable relief. *Zweig v. Horicon I. & M. Co.* 17 Wis. 362; *Crowley v. Hicks*, 98 id. 566.

D. D. Sutherland, for the respondent.

Bardeen, J. The defendants insist that the injunction should be dissolved, because (1) the claim upon which plaint-

iff's cause of action is based has not been allowed within the meaning of sec. 3835, R. S. 1878; (2) the complaint is bad on demurrer, and will, therefore, not support an injunction.

1. Plaintiff's right to maintain this action is based upon sec. 3835, R. S. 1878, which reads as follows: "Whenever there shall be just reason to apprehend that the estate of a deceased person, as set forth in the inventory returned into court by his executor or administrator, may be insufficient to pay the debts of the testator or intestate, any one or more of the judgment creditors, or creditors whose claims against the deceased shall have been allowed by the county court or commissioners appointed by said court, may, on behalf of all, bring an action in the circuit court, to reach and subject to sale any real estate or interest therein, or any other assets, not included in such inventory, which, according to law, ought to be subjected to the payment of such debts." The record shows that the claim represented by plaintiff had been duly presented to the county court in which the proceedings in the Leiby estate were pending, that objection was made thereto, that the same was duly allowed, and that an appeal therefrom had been taken to the circuit court. It is insisted that the appeal from the judgment of the county court so far suspends its operation that no proceedings looking towards the enforcement of any right based thereon can be taken. Sec. 4036, R. S. 1878, referring to proceedings in the county court, provides that, "after an appeal is claimed, and notice thereof given at the office of the county judge, all further proceedings in pursuance of the act appealed from shall cease until the appeal shall be determined." In *Gaston v. Babcock*, 6 Wis. 503, this court held that an appeal from an order of the county judge appointing a guardian for an insane person had the effect to suspend such order and all proceedings thereunder. In *In re Fisher*, 15 Wis. 511, it was said that the county court could not receive and act upon a petition for letters of administration of an estate with the

will annexed, pending an appeal from its order approving the will.

It will be seen that the decisions so far made have only gone to the extent of holding that no proceedings could be taken in the county court in furtherance of the matter appealed from, pending the appeal. It was not the purpose of the statute to limit or suspend the right the party might have to commence and maintain ancillary proceedings authorized by law in some other court, which might be in a measure dependent thereon, unless we can say that the appeal from the judgment entirely suspends its efficacy for any purpose, and renders it inoperative. It is true that under the statute last cited, the plaintiff was disenabled from taking any proceeding in pursuance of his judgment in that court. But sec. 3835 says, in effect, that when there shall be *just reason to apprehend* that the estate of a deceased person may be insufficient to pay the debts of the testator or intestate, any one or more of the creditors whose claims have been allowed by the county court may, in behalf of all, bring an action in the circuit court to reach property that ought to be applied to the payment of such debts. The suit so authorized must be in behalf of all creditors of deceased, and is ancillary to the proceedings in county court, and not dependent upon any single judgment therein rendered. This plainly appears to be so, because sec. 3836 says that such creditors' action shall not be brought to trial until the sufficiency or insufficiency of the assets of the estate shall be ascertained; and, if found sufficient, such action shall be dismissed at plaintiff's costs, and, if insufficient, then the suit may be prosecuted, and any sum realized therefrom, after paying costs, is to be applied to the payment of the debts of the deceased in the same manner as other assets. The real intent and purpose of these sections is to authorize any creditor whose claim had been allowed, and when there was *just reason to apprehend* a shortage in the

assets of the estate, to commence a suit, and tie up any real estate that ought to be subjected to the payment of such debts, until it is ascertained to a certainty whether it would be needed or not. But before he can proceed with his trial there must be a judicial determination in the county court as to the sufficiency of assets. *German Bank v. Leyser*, 50 Wis. 258. Any action thus commenced must be stayed until all proceedings relative to the allowance of claims and the marshaling of assets shall have reached such a final determination as will enable the county court to say with certainty that the necessity for further pursuit of fugitive assets exists.

In the enactment of these sections, the legislature seems to have had a prudential regard for the rights of creditors. It is a matter of common knowledge that when a debtor once starts on the dangerous path of placing his property beyond the reach of creditors both he and his grantees go to the end of the trail. There are always accommodating friends or disinterested relatives, all innocent of guile, ready and willing to assist in carrying out the scheme. If we may believe the allegations of the complaint, the defendants are not as "innocent as lambs, or white as the driven snow." The demurrer admits the truth of the complaint, and, *if* true, not being parties to the appeal from the county court, the defendants are not in position to urge equitable considerations with any great degree of force. We therefore hold that under the provisions of the statute cited, and in view of the purpose sought to be obtained thereby, the plaintiff's claim has been *allowed*, notwithstanding the appeal therefrom, in the sense that this action can be commenced by him, and held until the sufficiency of the assets of the Leiby estate is ascertained.

But, independent of these considerations, there is considerable authority, and from most respectable courts, holding that an appeal with a stay of proceedings merely suspends

the right to execution, and leaves the judgment, until annulled or reversed, valid, and binding upon the parties. Freeman, Judgments, § 328, and cases cited in note 2, p. 597. The court of Indiana has gone so far as to allow a party to maintain an ejectment action based on a judgment in partition, when such judgment had been appealed from, and was then undetermined.. *Randles v. Randles*, 67 Ind. 434. In a later case — *Line v. State ex rel. Louder*, 131 Ind. 468 — the court holds that the appeal does not preclude the party from suing on the judgment, or from prosecuting collateral or independent proceedings. These authorities are cited as illustrating the limit to which the rule has been carried, although it must be admitted that there are not a few conflicting decisions. This question was recently discussed in this court in *Smith v. Schreiner*, 86 Wis. 19, and the rule is there stated that a mere appeal does not affect the judgment as a bar to another action.

2. The objection that the complaint is bad on demurrer, and therefore will not support an injunction, is based upon two grounds: (1) That plaintiff has not legal capacity to sue, and (2) that the complaint does not state a cause of action. The defendants admit that under sec. 4015, R. S. 1878, the plaintiff had a right to present a claim on the Wroe bond for allowance in the Leiby administration proceedings, and the argument is that, when judgment was entered on that claim, he has exhausted all right to proceed to enforce the judgment, and that the action should have been brought in the names of the beneficiaries he represents. We do not think the point is well taken. The judgment on the claim presented was necessarily rendered in the name of the county judge. He appeared, by the record, as a creditor of the Leiby estate in his official and representative capacity, and he alone had authority to enforce it. The fact that sec. 4015 provides that the judgment so rendered "shall specify the amount found due to each particular person for whose

benefit it is brought" does not militate against this position. Under the law he stands really as the trustee of an express trust, and all moneys collected by him are, in fact, assets to be administered according to law. Being invested with these duties and charged with these obligations, no good reason is perceived why he may not, in his official capacity, take such steps as the law warrants, to secure the fruits of his judgment.

We think it sufficiently appears from the complaint that at the time Leiby made his deed to *John Leiby*, he did not retain sufficient property to pay his legal obligations. This deed was made May 14, 1894, and he died the following August. His entire assets, as shown by the inventory of his estate, were but $2,669. The claims presented against his estate amounted to over $11,000. This being his financial condition in August, it is a fairly reasonable conclusion to say that he was insolvent in May previous. This conveyance is alleged to have been voluntary, without consideration, and made for the purpose of avoiding the payment of any sum that might be found due on his bond. Under the law, plaintiff could not issue execution on his judgment in county court. The statute allows him to commence his suit when there is *just reason to apprehend* that the estate has not sufficient assets to pay debts. The complaint not only sets out the facts as above stated, but also contains an express allegation of insufficiency. If, subsequently, it appears that there are sufficient assets, then his action goes down. These provisions of the statute were passed in order to enable a court of equity to retain jurisdiction to grant relief in such cases, and which it would not take ordinarily in creditors' suits, until issue and return of an execution unsatisfied. *German Bank v. Leyser*, 50 Wis. 258.

By the Court.— The order of the circuit court is affirmed.

STACY and another, Appellants, vs. LA BELLE, Respondent.

April 18 — May 3, 1898.

Jurisdiction of state courts over contracts by Indians.

In the absence of any federal statute or treaty to the contrary, a state court has jurisdiction of an action on contract in favor of a white man against an Indian belonging to a tribe and a particular reservation.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Eugene M. Wescott*, attorney, and *F. M. Guernsey*, of counsel, and oral argument by *Mr. Wescott.*

For the respondent the cause was submitted on the brief of *G. C. Dickinson.* To the point that the state courts have no jurisdiction over the Indian tribes or members thereof, he cited *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 id. 516; *U. S. v. Thomas*, 151 U. S. 577; *U. S. v. Holliday*, 3 Wall. 407; *U. S. v. Partello*, 48 Fed. Rep. 670; *U. S. v. Boyd*, 68 id. 577; *U. S. v. Mullin*, 71 id. 682; *Morris v. M. P. R. Co.* 78 Tex. 17; *Carter v. U. S.* 37 S. W. Rep. 204; *U. S. v. Payne*, 4 Dill. 387; *Mungosha v. Steinbrook*, 3 id. 418; *Gray v. Coffman*, id. 393; *Mackey v. Coxe*, 18 How. 100.

CASSODAY, C. J. This action is to recover the balance of $279.65 due on account for goods, wares, and merchandise sold and delivered by the plaintiffs, as copartners, to the defendant, between July 1, 1888, and October 17, 1889. The defendant answered, and alleged, in effect, that he bought the goods, wares, and merchandise as partner with another, and that he was an Indian belonging to the Menominee tribe; that he resided with the tribe upon the reservation; and that the same was under the charge, direction, and control

of the United States Indian agent,—and prayed that the action be abated and dismissed. The cause was thereupon referred to a referee to hear, try, and determine; and, upon the cause being tried before the referee, he found, as matters of fact, in effect, that there was due to the plaintiffs from the defendant the amount claimed, with interest from October 17, 1889; that the defendant was an Indian, and belonged to the tribe, and resided upon the reservation; that there was nothing in any treaty with the tribe, nor any act of Congress, to prevent the state courts from taking jurisdiction; and hence that the plaintiffs were entitled to judgment.

The trial court modified the findings of the referee, but not essentially as to any question of fact, but found more in detail as to the status of the defendant as an Indian, and to the effect that the tribe held the reservation by treaty for their exclusive use and occupancy; that the same was under the charge, direction, and control of an Indian agent of the United States; that the goods and merchandise mentioned were furnished, sold, and delivered to the defendant by the plaintiffs on the reservation while *Stacy* was engaged in business as Indian trader on the reservation under and by virtue of the permit and license issued by the United States to him, as such Indian trader; that the defendant was a Menominee Indian, and a member of the tribe, born upon the Menominee reservation, and enrolled as such; that his mother lived upon the reservation, and was a member of the tribe; that his father was a white Frenchman, and not a member of the tribe. As conclusions of law, the court found, in effect, that the treaties and acts of Congress precluded the state courts from taking jurisdiction in a case like this, and that the trial court had no jurisdiction over the defendant in this action, and ordered judgment against the plaintiff, dismissing this action, but without costs. From the judgment entered thereon accordingly, the plaintiff brings this appeal.

Undoubtedly, Congress has power "to regulate commerce with the Indian tribes." Const. U. S. art. I, sec. 8. Under this clause of the constitution, it must be conceded that Congress has power to regulate all traffic and commercial intercourse among or with Indians, even when the tribe is located wholly within the limits of a single state. *Brown v. Maryland*, 12 Wheat. 419; *U. S. v. Holliday*, 3 Wall. 407; *U. S. v. Mayrand*, 154 U. S. 552. In making such regulations Congress may, undoubtedly, give to the federal courts exclusive jurisdiction. State courts may be precluded from taking jurisdiction in such cases, not only by congressional enactments, but by treaty between the particular tribe and the federal government; since such treaty, when made, under the constitution, becomes a part of "the supreme law of the land." Const. U. S. art. VI; *Worcester v. Georgia*, 6 Pet. 515; *U. S. v. Forty-three Gallons of Whisky*, 93 U. S. 188; *Ex parte Crow Dog*, 109 U. S. 556; *Farrington v. Wilson*, 29 Wis. 383. But it does not follow from such mere grant of such powers to the federal government that the state courts are precluded from taking jurisdiction in such cases, as seems to have been held by the trial court. On the contrary, the supreme court of the United States has frequently held, as was declared in the Federalist before the adoption of the constitution, in effect, that the powers delegated to the federal government were exclusive of the powers reserved to the states in only three classes of cases. One class is where the particular power granted is therein expressly stated to be exclusive; another class is where the power is granted in one clause, and then in some other clause or clauses the states are expressly prohibited from exercising the like authority; and the other class is where the power granted is, inherently and absolutely, repugnant to the exercise of a like power by the states,— as, for instance, powers which cannot be fully exercised within the limits of a single state, like the power "to regulate commerce with foreign nations and among the several states." No. 31 Dawson's (No. 32)

Federalist; *Cooley v. Board of Wardens*, 12 How. 318; *Gilman v. Philadelphia*, 3 Wall. 713; *Henderson v. Mayor of New York*, 92 U. S. 259; *Mobile Co. v. Kimball*, 102 U. S. 691; *Leisy v. Hardin*, 135 U. S. 100, 108, 109.

Manifestly, the case at bar does not belong to either of those classes. In this last case the distinction is clearly made by Chief Justice FULLER. Acting upon the principles suggested, Congress has expressly provided that "the jurisdiction vested in the courts of the United States," in the eight particular classes of cases therein mentioned, should "be exclusive of the courts of the several states." One of the classes of cases so mentioned is, "Of all crimes and offenses cognizable under the authority of the United States;" and another is, "Of all suits for penalties and forfeitures incurred under the laws of the United States." R. S. of U. S. sec. 711. With certain exceptions, those statutes provide that "the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, *shall extend to the Indian country*." R. S. of U. S. sec. 2145. But that section "shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." R. S. of U. S. sec. 2146. The exclusive jurisdiction of the federal courts was further extended to certain other crimes committed by Indians by the act of March 3, 1885 (23 Stat. at Large, 385, ch. 341, sec. 9). For a construction of these statutes, see *In re Wilson*, 140 U. S. 575; *In re Mayfield*, 141 U. S. 107; *Smith v. U. S.* 151 U. S. 50; *Westmoreland v. U. S.* 155 U. S. 545. In speaking of the statute as it stood before the act of 1885, Mr. Justice MILLER said: "It does not interfere

with the process of state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." *U. S. v. Kagama*, 118 U. S. 383. It has frequently been held that, except in so far as the jurisdiction of state courts has been restricted by federal legislation or treaty, they may take jurisdiction even of crimes committed by Indians. *State v. Doxtater*, 47 Wis. 278; *State v. Harris*, 47 Wis. 298; *People v. Ketchum*, 73 Cal. 635.

Counsel has not cited any federal statute or treaty which prohibits state courts from taking jurisdiction of an action on contract against an Indian, as in the case at bar, and we find none. The plaintiff *Stacy* was not an Indian agent, but he was licensed and expressly authorized to sell goods to Indians as an Indian trader. R. S. of U. S. secs. 2128–2132. The goods for which this action was brought were therefore properly sold to the defendant. In the absence of any federal statute or treaty to the contrary, and upon the principles stated, we must hold that a state court may take jurisdiction of an action on contract in favor of a white man, and against an Indian belonging to a tribe and a particular reservation. *Stokes v. Rodman*, 5 R. I. 405; *Swartzel v. Rogers*, 3 Kan. 374; *Ingraham v. Ward*, 56 Kan. 550; *Godfroy v. Scott*, 70 Ind. 259; *Ke-tuc-e-mun-guah v. McClure*, 7 L. R. A. 782, 122 Ind. 541; *Gho v. Julles*, 1 Wash. Ter. (N. S.), 325. In one of these cases it was held that "the fact that the lands of the defendant, who is an Indian, are not liable to levy and sale under a judgment, is no ground for refusing a judgment against him." 7 L. R. A. 782.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiffs, and against the defendant, in accordance with the findings of the referee.

WEBSTER, Respondent, vs. KILLEN and another, Appellants.

99 525
108 411
108 412

April 18 — May 3, 1898.

Ejectment for unoccupied land, against whom maintainable.

The original owner of land which is wild or unoccupied cannot, under sec. 3075, R. S. 1878, maintain an action of ejectment for such land against one who disclaims title, and who had, before the commencement of the action, conveyed a title held by him under a tax deed to a third party, by a deed which was not recorded until after the filing of the notice of *lis pendens* in the action.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action of ejectment to recover possession of 680 acres of land, which were and are wild and unoccupied. The defendants, by answer, denied withholding possession of the lands, and disclaimed all title thereto, and alleged that, prior to the commencement of the action, they had sold and conveyed all their right and title to said premises to one R. H. Markham.

The facts were stipulated, and were in substance as follows: (1) That the plaintiff was the original owner in fee of said lands; (2) that on the 19th of May, 1890, the defendants recorded tax deeds covering all of said lands in the office of the register of deeds for the proper county; (3) that subsequently, on the 3d of April, 1893, the defendants conveyed their title to one R. H. Markham, which deed was not recorded at the time of the commencement of this action; (4) that the summons and complaint in this action was served on the defendants, respectively on the 14th and 27th days of April, 1893, and that the complaint was filed in the office of the clerk of the circuit court of the proper county, April 13, 1893, and the *lis pendens* filed in the office of the register of deeds on the same day; (5) that the deed from the defendants to Markham was not recorded until the 5th of

June, 1895; (6) that, at the time of the commencement of the action, plaintiff had no knowledge of the conveyance to Markham; (7) that the defendants' answer was served on the 12th of June, 1893.

Upon these facts, the court found that the defendants unlawfully withheld the possession of said lands from the plaintiff, and that the plaintiff was entitled to judgment for the recovery of said premises, with nominal damages and costs. From a judgment in accordance with these findings, the defendants appeal.

The cause was submitted for the appellants on the brief of *Geo. W. Latta*, and for the respondent on the brief of *W. H. Webster*.

To the point that the recording of a tax deed was an assertion of title, and that the action was properly brought against the person holding such title of record, counsel for the respondent cited *Burchard v. Roberts*, 70 Wis. 111; *Lombard v. Culbertson*, 59 id. 433; *Hill v. Kricke*, 11 id. 442.

WINSLOW, J. The question is whether the original owner of wild and unoccupied lands can maintain ejectment against one who disclaims title, but who at one time held a recorded tax-title deed of the lands, and, before the commencement of the action, had conveyed his title to another; such last-named conveyance not being recorded until after the filing of the *lis pendens*. Upon both principle and authority, this question must be answered in the negative. The case of *Sherman v. Bemis*, 58 Wis. 343, seems to be conclusive upon the point. Ejectment may be brought against the actual occupant, or, if there be no occupant, against the person exercising acts of ownership or claiming title thereto or some interest therein at the time of the commencement of the action. R. S. 1878, sec. 3075. The defendants here neither occupied the property nor claimed any interest therein nor ownership thereof at the time of the commencement of the

action. When they conveyed their interest to another, their recorded tax deed ceased to be an assertion of title in themselves. They had no power to compel the grantee to put his deed on record.

By the Court.— Judgment reversed, and action remanded with directions to render judgment for the defendants in accordance with this opinion.

SHEBOYGAN BOOT & SHOE COMPANY and others, Appellants, vs. MILLER and others, Respondents.

April 18 — May 3, 1898.

Fraudulent conveyance: Evidence of fraud.

Evidence showing that a deed of land, though recorded, was executed without the knowledge of the grantee, and was never delivered to him until after an action was commenced to set it aside, and was not intended to be delivered except upon condition that he immediately execute a conveyance back to his grantor, and that the object of the transaction was to place the title of the property beyond the reach of the grantor's creditors, is sufficient to show that such deed was fraudulent.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action in equity to set aside a conveyance of real estate alleged to have been made by defendant *F. A. Miller* to defendant *Leon Miller*, with intent to defraud the creditors of the former, and to subject such real estate to the payment of the debts owing by *F. A. Miller* to plaintiffs. The only issue raised by the answer was as to whether the conveyance was made to defraud creditors as alleged. The trial court found, in substance, as follows:

(1) On the 7th day of October, 1895, defendant *F. A. Miller* was the owner of the lands described in the complaint,

and for more than four years prior thereto he had been such owner; and during all the time he had been in actual possession of the same as a place of residence for himself and family, and he had no other residence or dwelling place during such time.

(2) None of the allegations of the complaint are sustained by the evidence.

(3) Defendants are entitled to judgment dismissing the complaint with costs.

Such findings were duly excepted to, and this appeal was taken from the judgment entered in accordance with such findings.

For the appellants there was a brief by *Goodrick & Goodrick*, and oral argument by *A. B. Goodrick*.

For the respondents there was a brief by *B. A. Cady*, attorney, and *Felker, Stewart & Felker*, of counsel, and oral argument by *C. W. Felker*.

MARSHALL, J. All of the facts alleged in the complaint, necessary to sustain the cause of action to set aside the conveyance of *F. A. Miller* and wife to *Leon Miller*, and to subject the land in question to the payment of plaintiffs' judgments against the alleged fraudulent grantor, were admitted by the answer, except such as relate to the subject of fraud; so the only question to be considered on this appeal is, Does the evidence establish the allegations of the complaint that the conveyance of the land was made with the intent to hinder, delay, and defraud the grantor's creditors? True, the court found that the premises in question, at the time they were conveyed, constituted the homestead of *F. A. Miller* and wife, but there is no satisfactory evidence in the record to sustain such finding, and no such claim was made by the answer. The evidence is to the effect that *F. A. Miller* had no other home in the village where the premises were situated; that he had resided there for some years, but

that he had a farm elsewhere to which he removed either shortly before or shortly after the deed was made,— most likely it was before the making of the deed, because the premises in question were rented prior thereto.

It follows, as stated, that the sole question for consideration is, Does the evidence sustain the allegations of the complaint that the deed was made with intent to hinder, delay, and defraud *F. A. Miller's* creditors. On that subject Williams, a justice of the peace who drew the deed, testified in substance that it was made in his office and drawn at the request of the grantor, *Leon Miller* not being present; that after the deed was drawn and executed it was left with the witness by the grantor with instructions to have it recorded and then returned to his office and held subject to *F. A. Miller's* order; that it was sent for record accordingly, and then returned and retained for *F. A. Miller* as requested till after the commencement of this action, and then delivered to him; that the witness did not know *Leon Miller* in the transaction at all. Williams further testified that *Miller* told him at the time the deed was drawn, that he had matters coming up in court and wanted to make the deed in order to be prepared therefor; that the consideration was of no consequence, but to put it in $1,300; that after the deed was drawn *Miller* said he would have *Leon* come in and make a deed back and leave that in witness' possession. *Leon Miller* testified, but, without giving his evidence in detail, it showed clearly that he knew nothing about the transaction of making of the deed, at the time it was made, and that it was not in his possession till after the commencement of this action. It would serve no valuable purpose to go through his evidence at length. Suffice it to say that, so far as it touches upon the question of the delivery of the deed, or the circumstances leading up to the making thereof, it is so contradictory, uncertain, and unrea-

sonable as not to be entitled to consideration except to establish the fraud alleged.

From the foregoing the conclusion is irresistible that the deed in question was never delivered to *Leon Miller* prior to the commencement of this action, and was never intended to be delivered to him except upon condition of his immediately making a conveyance back to *F. A. Miller*, and that the whole transaction was an attempt to place the title of the property in question beyond the reach of *F. A. Miller's* creditors. So the finding of the trial court that the allegations of the complaint on the subject of fraud were not supported by the evidence, cannot be sustained. On the contrary, they are supported by all the credible evidence in the case, and are established beyond all reasonable controversy. The findings of the trial court should have been accordingly, and judgment should have been rendered in plaintiffs' favor in accordance with the prayer of the complaint.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment in accordance with the prayer of the complaint.

GRIEM, Respondent, vs. THE FIDELITY & CASUALTY COMPANY, Appellant.

April 18 — May 3, 1898.

Insurance: Stipulation in policy limiting time for bringing action: Legal proceedings.

1. A stipulation in an insurance policy limiting the time within which an action may be commenced thereon to a period shorter than that allowed by the statute of limitations, is valid and binding upon the parties, provided such time is not so short as to be unreasonable or the insurer has done nothing to induce delay.

2. The term "legal proceedings" in a stipulation in such policy that "legal proceedings for recovering hereunder may not be brought unless begun within six months" after the death of the insured, etc., means the commencement of an action on the policy.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

In August, 1892, the defendant issued its policy of insurance to one Charles Griem, in the sum of $1,000, insuring him against bodily injuries sustained through external, violent, and accidental means, with a provision that, if death should result within ninety days from such injuries, the company would pay that sum to the plaintiff, his wife. One of the conditions of the policy was as follows: "Immediate written notice must be given said company, at New York City, of any accident and injury for which a claim is to be made, with full particulars thereof, and full name and address of the insured. Affirmative proof of death, or loss of limb or of sight, or of duration of disability, must also be furnished to said company within two months from time of death, or of loss of limb or of sight, or of the termination of disability. *Legal proceedings for recovery hereunder may not be brought till after three months from date of filing proofs at this company's home office, nor brought at all unless begun within six months from the time of the death, loss of limb or sight, or the termination of disability.* Claims not brought in accordance with the provisions of this clause will be forfeited to the company."

On September 17, 1892, Griem died from injuries received by being run over by a car. Immediate notice of the accident was given defendant, and proofs of the injury and death were furnished April 1, 1893. Defendant refused to pay the loss, and the plaintiff commenced this action on the 7th day of August, 1893. The complaint sets out the issue of the policy, the accident to and death of Griem, the giving of notice, the furnishing of proofs of death, the fulfillment of

all of the conditions of the policy on the part of Griem, and the failure of the company to pay. The answer admits the issuing of the policy, notice of the accident, and that proofs of death were filed April 1, 1893. It sets up the condition of the policy before mentioned, and alleges that this action was not commenced within six months of the time of Griem's death. It also set out other conditions of the policy, and alleged that Griem's death occurred while he was intoxicated, and resulted from his attempting to jump on a moving train.

A special verdict was submitted to the jury, in which they found the issues for the plaintiff, and upon which judgment was rendered for the full amount due on the policy. Defendant appeals.

For the appellant there was a brief by *Phillips & Hicks*, and oral argument by *E. R. Hicks*.

For the respondent there was a brief by *Humphrey Pierce*, attorney, and *G. H. Dawson*, of counsel, and oral argument by *Mr. Pierce*. They argued, *inter alia*, that the notice of death, the filing of proofs, or any other act preparatory to enforcing the claim on the policy, was a "legal proceeding" within the meaning of the stipulation.

BARDEEN, J. The paramount question in this litigation is whether this action can be maintained in view of the limitation contained in the policy that the action must be brought within six months from the time of the death of the assured. It was stipulated by the parties that Griem died September 17, 1892, and that this action was not commenced until August 7, 1893, nearly eleven months after his decease. It is settled law in this state that stipulations in an insurance contract limiting the time within which an action may be commenced thereon to a time shorter than that allowed by the statute of limitations are valid and binding upon the parties. *Hart v. Citizens' Ins. Co.* 86 Wis. 77. While, as

suggested in that case, there are conflicting lines of decisions on this question, this court stands committed to the doctrine that parties must abide by the contracts they have made, and, in absence of any proof of facts and circumstances upon which an estoppel may be predicated, there can be no relief granted, unless the terms of the contract have been complied with. Of course, if the limitation were so short as to be unreasonable, or the company had done anything to induce the beneficiary in the policy to postpone commencing her action, a different question would arise, but there is no suggestion of anything of this kind in the case. It appears on the face of the complaint that proofs of death were not furnished the company until nearly seven months after Griem's death, and suit was not commenced until nearly four months thereafter. In *Shackett v. People's Mut. Ben. Soc.* 107 Mich. 65, where the limitation was nine months after death and suit was brought nine days after the expiration of that time, the court held that the action could not be maintained. In *Lentz v. Teutonia F. Ins. Co.* 96 Mich. 445, the limitation was six months, and the suit was brought six months and twelve days after loss. The plaintiff was defeated. There are many cases in other jurisdictions to the same effect. The rule is based on the letter of the contract, which leaves no room for construction.

But it is urged that the words "legal proceedings," used in the policy, do not necessarily mean proceedings in a court to enforce the claim; that the filing of proofs, the employment of counsel, drafting of papers, or other preparations for enforcing the claim, are "legal proceedings," within the meaning of the policy. We cannot agree with this construction of the words used. The stipulation is that "legal proceedings for recovery hereunder may not be brought unless begun within six months from the time of the death," etc. There is nothing uncertain or ambiguous in this clause. The suggestion that legal proceedings for recovery on this policy

may mean the employment of counsel by the beneficiary, or the preparation by her attorney of papers in his office, hardly merits sober consideration. *Ex parte* preparations to commence a suit hardly meet the requirement that "legal proceedings shall be begun" within the time limited. Legal proceedings, within the purview of this stipulation, must mean such proceedings to enforce the claim as the law sanctions or authorizes. Nothing short of the commencement of an action will fulfill this requirement. The plaintiff, having failed, without excuse, to live up to the terms and conditions of the contract, cannot justly complain because she is denied relief.

Several other questions relative to proceedings on the trial were urged for our consideration, but the view we have taken of the case renders it unnecessary to discuss or determine them.

In view of the stipulation as to date of Griem's death and the commencement of this action, no new trial will be necessary.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

In re Roszcynialla.

April 18 — May 3, 1898.

99 534
101 432
101 645

Criminal jurisdiction: Habeas corpus: *Waiver.*

1. A writ of *habeas corpus* only raises the question of the jurisdiction of the court or officer to issue the process under which the prisoner is held in custody.
2. A court which has obtained jurisdiction of the person of one arrested on a charge of burglary does not lose jurisdiction to afterward try him for that offense by reason of the fact that he had in the meantime been arrested, tried, and convicted by another court

for the crime of petit larceny, and was still suffering imprisonment for that offense when he was brought to trial for the burglary.

3. By appearing in court with his counsel on the trial for burglary, pleading not guilty, and going to trial without disclosing that he was then serving a term of imprisonment for larceny, and when called upon after conviction giving no reason why sentence should not be pronounced upon him, the prisoner waives the objection.

HABEAS CORPUS. *Petitioner remanded.*

C. W. Briggs and *C. T. McElroy*, for the petitioner.

A. C. Umbreit and *John L. Erdall*, first assistant attorney general, for the respondent.

[No briefs on file.]

CASSODAY, C. J. The petitioner asks to be released from the house of correction on *habeas corpus*. It appears from the record that in June, 1897, he and two others were arrested on the charge of burglary; that upon the preliminary examination they were held for trial; that the petitioner was released upon giving the requisite bond for his appearance; that, soon after, he was arrested on the charge of petit larceny, for stealing a rooster, and was tried for that offense in a justice court, and convicted, and August 18, 1897, sentenced by the justice to the house of correction for the term of six months; that October 4, 1897, as required by law, an information was filed against him and the two other persons on the charge of burglary; that October 5, 1897, the petitioner appeared in the municipal court, and pleaded not guilty thereto; that November 2, 1897, the petitioner and the two others, with their attorneys, were all present in open court, and proceeded to trial; that such trial continued until November 5, 1897; that on that day the jury returned a verdict of guilty, as to the petitioner; that sentence was suspended, as to him, until November 6, 1897, at 10 o'clock a. m.; that November 6, 1897, the petitioner, by his attorney, moved the court for a new trial; that the hearing on

the motion was continued until November 13, 1897; that on that day, with his attorney present in open court, he, by his attorney, withdrew his motion so made for a new trial; that he was then called upon by the court to give any reason he might have why sentence should not be pronounced upon him; that, as he gave no reason, the court sentenced him to be confined at hard labor in the house of correction for and during the full term and period of two years, to commence at 12 o'clock of that day; that January 25, 1898, a circuit court commissioner, on *habeas corpus*, ordered his release on the ground that the sentence for burglary was a nullity; that the order granting such release was reversed by this court, on *certiorari*, for the reason that the commissioner had no authority to grant the same (*State ex rel. Heiden v. Ryan*, *ante*, p. 123); that April 12, 1897, this writ of *habeas corpus* was issued by this court in order to determine the legality of such imprisonment.

It is well settled in this and other courts that a writ of *habeas corpus* cannot be made to perform the functions of a writ of error. On the contrary, it only raises the question of the jurisdiction of the court or officer to issue the process upon which the prisoner is held in custody. *In re Eldred*, 46 Wis. 530; *In re Milburn*, 59 Wis. 24; *In re Graham*, 74 Wis. 450, 76 Wis. 366, 17 Am. St. Rep. 174, affirmed, 138 U. S. 461; *In re Pikulik*, 81 Wis. 158; *In re French*, 81 Wis. 597; *In re Schuster*, 82 Wis. 610; *In re Eckart*, 85 Wis. 681; *State ex rel. Dunn v. Noyes*, 87 Wis. 340; *In re Rosenberg*, 90 Wis. 581.

There is no question but that the municipal court obtained jurisdiction of the person of the petitioner on the charge of burglary, nor that it had jurisdiction to try him for that offense. The contention seems to be that that court lost jurisdiction to try the case by reason of the subsequent conviction and sentence of the petitioner, in justice's court, to imprisonment for six months for the crime of petit larceny.

It is true that the term for which he was so imprisoned for larceny had not expired when he was so tried for burglary; but he appeared in court, by his counsel, and the fact that he was then serving a sentence for larceny does not seem to have been brought to the attention of the municipal court until near the close of the trial, which lasted four days, and it was then only mentioned incidentally. He had appeared in court a month before, and pleaded not guilty. No objection was made to the time or place of trial. The motion for a new trial was voluntarily withdrawn. No objection was made to the time or place of sentence being pronounced for the burglary. Had the petitioner made timely request for a continuance of his trial for burglary, it probably would have been granted. If the petitioner had the power to waive the objection now made, he certainly did so. In *Knoll v. State*, 55 Wis. 256, it was insisted that in a case of murder, like that, "it was the duty of this court to review the charge, even though it was not excepted to, and, if found incorrect in the propositions of law laid down for the guidance of the jury, to reverse on that ground;" but, after careful consideration, the court held that "in criminal as in civil trials this court reviews the instructions given to the jury only so far as exceptions have been taken thereto." *Id.* 250. That ruling has been steadily adhered to. *Clifford v. State*, 58 Wis. 485, 486; *Rollins v. State*, 59 Wis. 55; *Grottkau v. State*, 70 Wis. 472; *Zoldoske v. State*, 82 Wis. 603, 604; *Porath v. State*, 90 Wis. 537.

In one of these cases it was held that "in criminal cases, unless exceptions are duly taken, no errors will be considered which do not appear upon the face of the record proper." In another of these cases the accused and his counsel claimed that in an early stage of the trial they had observed some of the jurymen being treated by the prosecution; but it was not brought to the attention of the trial court until after the verdict. The objection being raised in this court, it was

said: "Whatever may have been the motive for the delay in bringing the matter to the attention of the court, the law will not allow a party to secure a benefit by thus speculating upon the chances. In the trial of causes, as well as other matters conducted by human agencies, there will unavoidably be more or less inadvertence, irregularity, mistake, impropriety, and error. As often reiterated, the administration of the law is not an exact science; and yet it aims at substantial justice, and generally secures it. By reason of these things, parties and their counsel, in criminal as well as civil cases, are required to bring any supposed impropriety or error to the attention of the court, and obtain a ruling or action thereon, at the earliest opportunity, in order to become available. Even then the party feeling aggrieved must promptly take, and preserve in the record, his exception, or the supposed error will be deemed waived." An objection to an incompetent juror has been held waived by not taking it in time. *State v. Vogel*, 22 Wis. 471. In *State v. Lockwood*, 43 Wis. 403, it was held that, upon plea of not guilty, a jury trial could not be waived; but that case was distinguished in *In re Staff*, 63 Wis. 285, where it was held that "a statute permitting the defendant in a criminal action to waive a trial by jury is not unconstitutional." In that case the prisoner had been convicted of larceny, and sentenced to the state prison for two years; but this court refused to discharge him on *habeas corpus*, notwithstanding he had waived a jury trial, and had been convicted by the court.

For a prisoner to go to trial without objection not only waives prior irregularities, but objections going to the jurisdiction of the person. *State ex rel. Brown v. Fitzgerald*, 51 Minn. 534; *Gott v. Brigham*, 41 Mich. 227; *Ker v. Illinois*, 119 U. S. 436; *Mahon v. Justice*, 127 U. S. 700. The case is clearly distinguishable from those cited by counsel where there had been a re-sentence or double sentence for the same

offense, as in *People v. Meservey*, 76 Mich. 223; *People v. Kelley*, 79 Mich. 320. In Nebraska it has been held that "where a person has been convicted at the same term of court of several distinct offenses, each punishable by imprisonment in the penitentiary, whether charged in separate informations, or in separate counts of the same information, the court may impose a separate sentence for each offense of which the prisoner has been found guilty." *In re Walsh*, 37 Neb. 454. In the case at bar the petitioner was in no way prejudiced by the sentence imposed for burglary. By commencing when it did, it shortened his aggregate time of service about three months.

We must hold that the judgment and sentence are valid and binding.

By the Court.—The petitioner, *Peter Roszcynialla*, is hereby remanded to the custody of the keeper of the house of correction for Milwaukee county.

TENNEY, Appellant, vs. THE CITY OF MADISON and others, Respondents.

May 6 — May 9, 1898.

Appeals from orders: Dismissal for insufficiency of record: Undertaking, defects cured.

1. The failure of the clerk of the trial court, upon an appeal from an order, to transmit the original papers (or copies) used by each party on the motion, and to certify them to be such original papers or copies, as required by sec. 3050, R. S. 1878, or of the order to refer to all records and papers read or used by either party on the motion, as required by Circuit Court Rule XI, sec. 6, renders the appeal subject to be dismissed.
2. The accidental omission from an undertaking on appeal, conditioned for the payment of all costs and damages which may be awarded on the appeal and all which may be sustained by reason

of the continuance of a temporary injunction, of the penal sum required by the terms of the order, may, under the provisions of sec. 3068, R. S. 1878, be cured upon motion in the supreme court, by the filing of a proper undertaking.

3. The plaintiff's right, under sec. 3061, R. S. 1878, to a continuance of an injunction until the decision of the appeal, does not become absolute and irrevocable upon his giving the required undertaking, but is subject to the right of the respondent, at any time pending the appeal, to file an undertaking to abide and perform any final judgment which may be rendered in favor of the appellant in such action; but a failure of the order to give the respondent that privilege may be corrected in the supreme court.

APPEAL from an order of the circuit court for Manitowoc county: N. S. GILSON, Circuit Judge. The respondents moved in this court to set aside the stay of proceedings and dismiss the appeal. The appellant moved for leave to file a new undertaking. *Appellant's motion granted on terms.*

H. M. Lewis, for the appellant. [No brief on file.]

For the respondents there was a brief by *John A. Aylward* and *H. W. Chynoweth*, and oral argument by *H. W. Chynoweth.*

The following opinion was filed May 24, 1898:

WINSLOW, J. This is an action in equity brought by the plaintiff, a taxpayer of the city of *Madison*, in his own behalf and on behalf of all other taxpayers, against the city, its mayor and clerk, to perpetually enjoin the city and its officers from entering into a contract with the American Sanitary Engineering Company for the erection of certain sewage purification works in said city, and from issuing corporate bonds to pay for the same, on various grounds of alleged illegality. The action was commenced in the circuit court for Dane county, but removed by order changing the venue to the circuit court for Manitowoc county. Upon the complaint and exhibits attached, a motion was made for an injunctional order *pendente lite*, and an order to show

cause was obtained from a court commissioner, with a temporary restraining order until the hearing of the motion. After the change of venue, this motion was heard by the court, and the temporary injunctional order was vacated on the 7th of March, 1897, and the motion for a preliminary injunction was denied. Immediate notice of appeal from this order was given by the plaintiff, and on the 9th of March a formal, written notice of appeal was given, accompanied by an undertaking, signed by two sureties, to the effect that if said order, or any part thereof, should be affirmed, the appellant would pay all costs and damages awarded against him on the appeal, and all of which the defendants, or either of them, might sustain by reason of the continuance of the injunction. No penal sum was named in the undertaking, but it was approved by the circuit judge, and an order made reciting the giving of the undertaking "in the sum of ten thousand dollars," and staying proceedings upon the order of March 7, and directing that the preliminary order remain in force pending the appeal, with certain modifications which are unnecessary to be stated. Thereupon all the papers on file in the action were transmitted to this court, pursuant to the appeal.

On the 6th of May, 1897, the respondents moved in this court, upon the papers returned, to set aside the stay and to dismiss the appeal. At the same time the appellant presented to this court an affidavit showing that by mistake the penal sum of the undertaking upon the appeal had been omitted, and also presented a new undertaking, with the same sureties and the same conditions, except that the penal sum of $10,000 was inserted therein in the proper place, and moved for leave to file the same in this court as a substitute for the original undertaking. These motions were all heard and disposed of together, and, as the questions of practice are of some importance, it has been deemed best to place on file a brief opinion stating the reasons for the action taken.

1. Under well-established rules of this court, the appeal is subject to dismissal, because there is nothing in the return to show upon what papers the order appealed from was based. The statute (R. S. 1878, sec. 3050) requires the clerk to transmit the original papers used by each party upon the motion (or copies thereof, if ordered by the trial court), and to certify that they are the original papers, or copies, as the case may be. Sec. 6, Rule XI, of the circuit court rules, requires that an order refer to all records and papers used or read by either party upon the application. Neither of these requirements has been complied with in the present case, and we cannot ascertain from the record what particular papers in the mass returned were used upon the motion. Under such circumstances, the appeal will ordinarily be dismissed. *Glover v. Wells & M. Grain Co.* 93 Wis. 13; *Hoffman & B. Mfg. Co. v. Burdick*, 95 Wis. 342.

2. In order to obtain a continuance of the temporary restraining order pending the appeal, under sec. 3061, R. S. 1878, the trial judge required an undertaking in the sum of $10,000, conditioned for the payment of all costs and damages which might be awarded on the appeal, and all which might be sustained by reason of the continuance of the injunction. The undertaking given left out the penal sum entirely, and was thus probably insufficient to warrant the continuance of the temporary injunctional order. It affirmatively appears, however, by the affidavit of Mr. Lewis, that this omission resulted from accident or mistake in the hurried drawing of the papers. It is not a case where by design no undertaking was given, as in *Tyson v. Tyson*, 94 Wis. 225, and where the application to remedy the difficulty must be made to the trial court, but rather a case where there was an accidental omission to do an act necessary to obtain a stay of proceedings, and where, by the terms of sec. 3068, R. S. 1878, the omission may be cured upon motion in this court. This difficulty may therefore be remedied by this court.

3. It seems to have been considered by the trial court that upon the giving of the undertaking in the sum of $10,000, as required under the provisions of sec. 3061, R. S. 1878, the plaintiff's right to a continuance of the injunction until the decision of the appeal became absolute and irrevocable. Reference to the statute shows, however, that this is an erroneous idea. The section provides that upon the giving of the required undertaking the injunction before granted may be continued until the decision of the appeal, "*unless* the respondent shall at any time pending the appeal give an undertaking with sufficient surety in a sum to be fixed by such court or judge to abide and perform any final judgment that may be rendered in favor of such appellant in the action." This provision grants the respondents a very valuable right, and one which should have been recognized and provided for in the order. It seems to have been omitted by inadvertence, and, as the entire matter is now here upon appeal, we see no reason why this court may not, in the exercise of its appellate jurisdiction, grant the respondents the privilege preserved to them by statute,— especially as this proceeding is not one upon which the appeal itself in any way depends.

In view of the importance of the questions apparently involved in this appeal to the citizens of *Madison*, and also of the fact that seasonable application has been made to perfect the appeal and the return, we have concluded not to dismiss the appeal peremptorily, but to allow opportunity for the proper corrections to be made, and have therefore ordered that the appeal be dismissed *unless* within twenty days the appellant pay respondents $25 costs, and procure and file in this court a supplemental certificate and return, under sec. 3050, R. S. 1878, showing that the papers and records returned are the papers which were used on the hearing of the motion; leave being granted to withdraw the record for that purpose. In case such supplemental return is made, the additional undertaking presented by

appellant may be filed in this court with the same effect as if filed in the trial court, unless the respondents within twenty days file in this court an undertaking, conditioned as provided by the last clause of sec. 3061, R. S. 1878, in the sum of $10,000, with two sufficient sureties, to be approved by one of the justices of this court, in which case the order continuing the injunction pending the appeal shall be vacated.

By the Court.— Ordered accordingly.

McLellan, Appellant, vs. The Mayor and Common Council of the City of Janesville, Respondents.

May 4 — May 9, 1898.

Excise laws: Revocation of license: Appeal: Stay of proceedings.

The plain legislative policy of this state being that no stay of proceedings shall be obtainable to interfere with the proceedings of the governing board of a town, city, or village, in revoking a license to sell liquors, or to stay the effect of such revocation pending proceedings to test its legality, it is an unjustifiable use of the discretionary power of the circuit court to grant such a stay pending an appeal to this court from an order refusing a temporary injunction against a city council in such proceedings.

[Syllabus by Marshall, J.]

Appeal from an order of the circuit court for Rock county: John R. Bennett, Circuit Judge. The respondents moved in this court to vacate an order of the circuit court continuing a temporary injunction pending appeal. *Motion granted.*

F. C. Burpee, city attorney, for the motion.

In opposition there was a brief by *Dunwiddie & Wheeler*, and oral argument by *W. G. Wheeler*.

The following opinion was filed May 24, 1898:

Marshall, J. Proceedings were commenced February 14, 1898, before the common council of the city of *Janesville*,

to revoke plaintiff's license to sell liquor in such city, and before a final termination of such proceedings, he commenced this action in equity in the circuit court for Rock county to enjoin the council, alleging certain irregularities going to its jurisdiction. A temporary injunction was allowed by a court commissioner, which was set aside by the circuit court, and thereupon an appeal was taken to this court, and an order was granted continuing the injunction, pending such appeal. Respondents now move the court to vacate such order.

Clearly, as contended by counsel for respondents, if, when proceedings are instituted before the proper body to revoke a liquor license, an action in equity can be commenced to stop them and a temporary injunction be obtained effecting that result, pending a final determination of the case in the court of last resort, the way is open and will readily be taken advantage of on all occasions to render the statutes on the subject valueless, by preventing the remedy of revocation of such license as punishment for violation thereof being effectually enforced. Nevertheless, as the order complained of was the result of an appeal to the discretionary power of the court, it cannot be disturbed unless we can say there was a clear abuse of judicial discretion.

Manifestly, if the council had proceeded to a final determination of the matter and revoked plaintiff's license, it would have been final unless void for jurisdictional defects. If void on that account, plaintiff might have successfully defeated any proceedings brought against him, depending upon the validity of the revocation, or he could have removed the proceedings of the council by writ of *certiorari* to the circuit court for review, and had a speedy hearing, as will be hereafter seen.

From the foregoing, no reason is perceived why a court of equity should take jurisdiction of such a matter. That the remedy by *certiorari* is the one contemplated by the stat-

ute, and without any *interim* stay to protect the licensee, is clearly indicated by sec. 1559*a*, S. & B. Ann. Stats., which provides that when a writ of *certiorari* shall issue from the circuit court to the board of supervisors of a town, president or trustees of a village, or to the mayor or aldermen of a city to certify up his or their proceedings revoking licenses to sell liquors, or when an appeal is taken from the circuit court to the supreme court in such cases, it shall in no wise have the effect of suspending such order of revocation during the pendency of the matter in the court to which the same shall have been certified or appealed; and that the person whose license shall have been revoked, and who shall have sued out a writ of *certiorari* to test the legality of the revocation, may have the matter heard on a ten-day notice at any term of the circuit court in his circuit, or before the circuit judge at chambers. There can be no mistaking the legislative intent in that enactment. It clearly is that proceedings to test the legality of a revocation of a liquor license shall be by writ of *certiorari*, and that there shall be no stay of the revocation till declared illegal for want of jurisdiction, and that the person seeking such revocation shall be protected so far as practicable by the right to a speedy hearing before the circuit court or before the judge at chambers. The danger of the beneficial statute for revoking licenses being nullified by enforced delays, keeping alive such licenses till their expiration by operation of law, without some such provision as sec. 1559*a*, was clearly foreseen and wisely provided against. The necessity for it is evident by the situation in this case. Whatever may have been the transgressions of the plaintiff rendering his license revocable, by means of the stay he secured now sought to be set aside, he would be able, if the stay were continued, to enjoy the benefits of his license to the end, and laugh at the futile efforts of the public to take it away.

We think the enactment to prevent the suspension of the

revocation of a license pending proceedings by writ of *certiorari* to test its validity evinces so clearly the legislative intent to prevent the law's delays, in that particular class of cases, being worked to hamper and defeat a speedy bringing to justice of transgressors of the liquor laws, that the exercise of the discretionary power of the court to tie the hands of the council of the city of *Janesville*, pending the appeal in this case cannot be sustained.

By the Court.—The motion to set aside and vacate the order of the court below continuing the temporary injunction restraining the mayor and common council of the city of *Janesville* in the matter of the revocation of plaintiff's license to sell liquors in said city, is hereby granted, with motion costs.

NELSON and others, Respondents, vs. JACOBS, imp., Appellant.

April 12—May 24, 1898.

Foreclosure of land contract: Waiver of objection to judgment: Vendor and purchaser: Marketable title.

1. In an action for the foreclosure of a land contract the proper judgment is one of strict foreclosure, but the entry of a judgment for a foreclosure and sale and conveyance of the land is a mere irregularity, which is waived by a defendant who resists a motion to have such judgment corrected, and he is precluded from afterward objecting thereto.
2. An open, notorious, and exclusive possession of land, claiming title and paying taxes, for twenty years before the commencement of an action therefor against the possessor creates a marketable title by virtue of our statute of limitations (sec. 4207, R. S. 1878), which a purchaser under a land contract who has stipulated for a clear and indefeasible title is bound to accept.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This is an action to foreclose a land contract. The follow-

ing facts appear from the record, and are admitted or found by the court:

On July 10, 1895, the plaintiffs, as parties of the first part, by N. B. Van Slyke, their agent, entered into a written contract with the defendant *Jacobs* as party of the second part, wherein and whereby, for and in consideration of one dollar, and a proper transfer and delivery of the personal property therein mentioned, and the further consideration of $12,000 in cash to be paid by the said *Jacobs* to Van Slyke, he, the said Van Slyke, as such agent, agreed, in effect, to have made and delivered to said *Jacobs* the deed of conveyance with clear and indefeasible title to the real estate described therein, consisting of 192 acres, as named in the contract, but which, by an accurate survey as therein provided, was reduced to 189.8 acres, at the rate of $110 per acre, and the cash payment mentioned reduced proportionately; that the cash payment be made on or before forty days from the day on which the deed should be ready for delivery, the same to be deposited with the First National Bank of Madison in escrow, and to be delivered upon the final cash payment, as therein provided for.

One William Nelson acquired title to the land by sheriff's deed on foreclosure sale, and such a deed was duly recorded in Dane county December 17, 1859. William Nelson thereupon went into the actual and exclusive possession of said real estate, including the triangular piece hereinafter mentioned, and soon thereafter protected the same by substantial inclosures, and he and his legal representatives have ever since and up to the time of the commencement of this action continued in the actual, open, notorious, and exclusive possession of said lands, claiming title thereto founded upon said written instrument and possession. On September 7, 1869, William Nelson made his last will and testament. Prior to October 29, 1869, he died. The will was admitted to probate in New York. Upon the proper authentication

therein the will was duly admitted to probate by the Dane county court February 8, 1870, and a copy thereof was duly recorded in Dane county at that time. William Nelson, by his will, vested all the title to the land in question, which he acquired by such sheriff's deed, in the plaintiffs, as executors and trustees or otherwise. On August 3, 1895, Van Slyke, as attorney in fact for the plaintiffs, and in pursuance of the powers of attorney from them to him, executed a deed of the premises described to said *Jacobs*, as previously requested by him, and delivered the same in escrow to the First National Bank on that day, to be delivered to said *Jacobs* upon his making such cash payment. Said *Jacobs* was thereupon and on the same day notified of the execution and delivery of said deed in escrow. Said *Jacobs* then refused to accept the same, upon the ground that the executors named therein could not delegate their authority to another to execute a conveyance of the real estate, and insisted that a conveyance of the same should be made directly to him from the general executors and trustees in addition to the deed so already executed. To comply with the wishes of said *Jacobs*, Van Slyke thereupon obtained a deed dated September 9, 1895, properly witnessed, executed, and acknowledged, from said executors and trustees to said *Jacobs*, and deposited the same in escrow in the First National Bank September 12, 1895, to be delivered to said *Jacobs* upon his making the cash payment mentioned. Said *Jacobs* was notified on that day of such deposit, and he was then and there requested to fulfill on his part the terms and conditions of said agreement, but he then and there refused, and September 13, 1895, made further objections in writing to the title, upon the ground that the triangular piece of land in the S. W. ¼ of the N. E. ¼ of section 6, lying northwest of Corss street in Farwell's replat and addition to Madison, consisting of about fifteen acres, seemed to be in Durastus K. Cady and his heirs, and upon the further ground that such deed

from such executors and trustees should have been in pursuance of judicial sanction or permission. Said *Jacobs* was then assured, as the fact was, that said triangular piece of land had always been treated as part of the premises covered by the mortgage and by the sheriff's deed delivered to William Nelson on the foreclosure of that mortgage, and recorded December 17, 1859; that said William Nelson at that time went into possession of said triangular piece of land as part of the premises thereby conveyed, and that he and his representatives protected the same by substantial inclosures, and had occupied and used the same for agricultural purposes, and had been in the open, notorious, and exclusive possession of the same for more than twenty years prior to July 10, 1895, to wit, from December 17, 1859, claiming title thereto, and had paid all the taxes assessed against said land; that said Durastus K. Cady had removed from Wisconsin; that neither he nor his heirs had ever been in possession of said land, or any part thereof, and had never made any claim thereto; that in September, 1895, it had been ascertained that Durastus K. Cady was dead; that his widow and heirs were residing in Jefferson county, Missouri; that a deed could be procured from such widow and heirs releasing and quitclaiming their alleged title to said triangular piece of land for $50.

In order to meet all the objections of said *Jacobs*, and in order to avoid delay and expense of litigation, the plaintiffs paid said $50, and obtained a quitclaim deed to Van Slyke of said triangular piece of land, dated November 12, 1895, executed by the widow and the two sole heirs at law of said Durastus K. Cady, who died intestate in said Jefferson county in 1876. Said deed was recorded in Dane county December 7, 1895. Van Slyke, by quitclaim deed, conveyed the same to Thomas Nelson, one of the plaintiffs above named, and caused said deed to be recorded prior to December 16, 1895. Said deed from the Cadys had but one witness.

Objection being made thereto by said *Jacobs* upon that ground, the same was returned to Missouri, and attested by another witness, and then recorded, all before the summons and complaint in this action were served. Said Jacobs, with knowledge of the fact that the Cady deed was so corrected and recorded, refused to accept the deeds tendered September 12, 1895.

Thereafter, and before the commencement of this action, said *Jacobs* requested the attorney for the plaintiffs to bring, at as early a date as convenient, a suit in order to test the question as to the power of the executors and trustees to make such conveyance. Relying upon said title, said *Jacobs* had made conveyances of a portion of the property, and while the title might be satisfactory to him, it might be objected to by others to whom he expected to sell lots. *Jacobs'* attorney, at his request, suggested certain provisions of the said will to be incorporated into the complaint. In pursuance of the request of said *Jacobs* the complaint was thereafter prepared, and the action commenced by the service of the summons and complaint upon said *Jacobs* December 24, 1895. On September 12, 1895, said *Jacobs* and wife conveyed to the defendant C. A. Beebe, by warranty deed, an undivided one-half of the lands embraced in the contract for $15,000, as recited in the deed, which deed was duly witnessed and acknowledged. On September 30, 1895, said *Jacobs* conveyed an undivided one-sixteenth interest in said lands by warranty deed to S. M. Jacobs. Subsequently, and prior to the trial of this action, he made other conveyances of portions of said real estate by warranty deed, claiming to be the owner thereof in fee simple. Prior to July 10, 1895, Van Slyke, as such agent, had, by lease commencing December 1, 1894, rented said land for one year from that date at $150 per year. It was the duty of said *Jacobs* to accept the deeds tendered September 12, 1895, and to make payment of the remainder of the purchase price of $11,758 forty

days thereafter, to wit, October 22, 1895, and the plaintiffs are entitled to interest on that sum from October 22, 1895. Said *Jacobs* is entitled to a credit on account of the annual rental of $16 to be deducted from the sum stated, leaving $11,742, with interest from October 22, 1895, due to the plaintiffs, making in all $12,415.20 at the time of the entry of judgment herein. The plaintiffs kept good their tender of said deeds so made until the time of the trial; but said *Jacobs* neglected and refused to make such cash payment and take possession.

As conclusions of law the court found, in effect, that the plaintiffs fully complied with the terms and conditions of the contract; that said deeds so tendered September 12, 1895, constituted a conveyance with clear and indefeasible title to said real estate; that the plaintiffs became entitled to the cash payment October 22, 1895, as stated; that said *Jacobs* had failed to comply with the terms and conditions of said contract by his refusal to accept said deeds so tendered, and by his refusal to pay the balance of the purchase price remaining due thereon; that the plaintiffs were entitled to recover such balance and interest, with the costs and disbursements of this action; that the deed to Van Slyke from the Cady widow and heirs and from Van Slyke to the plaintiffs prior to the commencement of this action completely extinguished any title that might have been asserted on behalf of said widow and heirs of Cady, and placed such title, if any, and such claim of title, in the plaintiffs; that the plaintiffs were entitled to judgment in the nature of a strict foreclosure *or otherwise*, as the plaintiffs might be advised. Judgment was ordered to be entered accordingly as of October 6, 1896.

Judgment was thereupon entered accordingly as of October 6, 1896. Subsequently to the entry of the judgment, on motion of the plaintiffs, an order was made December 18, 1896, permitting the plaintiffs to add as defendants Mary

E. Jacobs, Charles F. Cronk, Idella Cronk, C. A. Beebe, and Ellie S. Beebe, and they were made defendants accordingly, and service of the summons and complaint was made upon them accordingly. Issues were joined by such new defendants answering the second amended complaint, and such proceedings were had thereon that the trial court, March 31, 1897, ordered and adjudged that the original judgment be so amended as to bar and foreclose such new defendants, and each of them, of all right, title, and interest in and to the real estate described, and in any equity of redemption in and to said premises after the sale and confirmation thereof, as provided in said original judgment; and the original judgment was therein and thereby amended accordingly.

From the judgment so entered as of October 6, 1896, and as amended March 31, 1897, and the whole and every part thereof, the defendant *William H. Jacobs* brought this appeal August 18, 1897.

Charles N. Brown, attorney, and *F. J. Lamb*, of counsel, for the appellant, argued, *inter alia*, that the judgment should have been one of strict foreclosure, and the entry of a judgment for the sale of the premises and for deficiency was erroneous. *Button v. Schroyer*, 5 Wis. 598; *Baker v. Beach*, 15 id. 99; *Landon v. Burke*, 36 id. 378; *Superior Consolidated L. Co. v. Nichols*, 81 id. 656. The judgment is erroneous in allowing interest on purchase money from a date prior to the plaintiffs' acquiring such a title to fifteen acres of the land as the defendant was bound to accept. They base their claim of adverse possession upon a sheriff's deed on foreclosure, which deed does not embrace that tract, and will not avail them for that purpose. R. S. 1878, sec. 4211; *McEvoy v. Loyd*, 31 Wis. 142; *Furlong v. Garrett*, 44 id. 111; *Childs v. Nelson*, 69 id. 125; *Lampman v. Van Alstyne*, 94 id. 417, 430. Their possession was not adverse. It was their intent only to take and hold what was included in the sheriff's deed. *Ayers v. Reidel*, 84 Wis. 276, 283;

Dhein v. Beuscher, 83 id. 316, 327; *Ricketson v. Galligan*, 89 id. 394, 397; *Allis v. Field*, id. 327, 333; *Kurz v. Miller*, id. 426, 433; *Ryan v. Schwartz*, 94 id. 403, 411; *Fuller v. Worth*, 91 id. 406, 411. The express provisions of sec. 4210, R. S. 1878, make the plaintiffs' claim of title to the fifteen acres presumably invalid. The court could not make their title "clear and indefeasible" as against the holders of the outstanding title by any judgment in a suit to which they were not parties. Story, Const. 264, 661; *Davidson v. New Orleans*, 96 U. S. 103; *McCabe v. Kenny*, 52 Hun, 514; *Fleming v. Burnham*, 100 N. Y. 1; *Sexton v. Rhames*, 13 Wis. 99; *Sanger v. Mellon*, 51 id. 560; Freeman, Judgments, § 154; *Landauer v. Espenhain*, 95 Wis. 169, 175. A title is doubtful which depends upon matters of fact to be proved by witnesses, such as adverse possession, where the parties who may claim adversely are not before the court. Sugden, Vendors, [386] 576. A purchaser will not be compelled to accept such a title. Fry, Specific Performance (3d Am. ed.), 428; *Cunningham v. Sharp*, 11 Humph. 116; *Lewis v. Herndon*, 3 Litt. 358, 14 Am. Dec. 68, and note; *Smith v. Hollenback*, 51 Ill. 223; *Moore v. Williams*, 115 N. Y. 586.

For the respondents there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford*. They argued, among other things, that an adverse title acquired by prescriptive user is not for that reason doubtful, nor can the same be said to be unmarketable simply because the vendor is unable to show a regular and legitimate inception. *Gates v. Parmly*, 93 Wis. 294; Waterman, Specific Performance, § 411 *et seq.*; *Pratt v. Eby*, 67 Pa. St. 396; *Moser v. Cochrane*, 107 N. Y. 35; *Abrams v. Rohner*, 44 Hun, 507; *N. Y. Steam Co. v. Stern*, 46 id. 210; *Wright v. Young*, 6 Wis. 127; *Townshend v. Goodfellow*, 40 Minn. 312; *S. C.* 3 L. R. A. 739, and notes; 3 Washb. Real Prop. (4th ed.), 54; *School Dist. v. Benson*, 31 Me. 385; *Bowen v. Preston*, 48 Ind. 367, 374. The statute of limitations destroys

not only the remedy, but the right also, and operates as a conveyance or new source of title. *Sprecher v. Wakeley*, 11 Wis. 432; *Knox v. Cleveland*, 13 id. 245; *Lain v. Shepardson*, 23 id. 224; *Mather v. Hutchinson*, 25 id. 27; *Cahill v. Palmer*, 45 N. Y. 478; *Sherman v. Kane*, 86 id. 57; *McPherson v. Schade*, 149 id. 16.

CASSODAY, C. J. The complaint demanded judgment that the defendants perform the agreement to purchase the land, and pay to the plaintiffs the remainder of the purchase price, with interest from October 22, 1895; in other words, the action was for a strict foreclosure of the contract. The judgment entered is, in effect, for the foreclosure of the contract, a sale and conveyance of the land, a confirmation thereof, a disposition of the surplus moneys arising on the sale, if any, and, in case of a deficiency, that judgment be entered against the defendant *William H. Jacobs*, who is legally liable to pay the same. We agree with the counsel for the appellant that it was error to enter judgment in that form. The adjudications of this court are to that effect. *Button v. Schroyer*, 5 Wis. 598; *Baker v. Beach*, 15 Wis. 99; *Landon v. Burke*, 36 Wis. 378; *Church v. Smith*, 39 Wis. 492; *Superior Consolidated Land Co. v. Nichols*, 81 Wis. 656. Such objection to the form of the judgment is, at most, a mere irregularity. It did not deprive the court of jurisdiction to enter the judgment. Its entry was in violation of no statute. Strict foreclosure is not the vendor's only remedy in such cases. *First Nat. Bank v. Agnew*, 45 Wis. 131.

The question recurs whether the appellant's conduct was such as to waive the irregularity. It appears that the cause came on for trial at the September term of the court for 1896, to wit, October 6, 1896; that the appellant was not able to submit to an examination at that time; that it was then stipulated in open court that the trial should proceed, and that the deposition of the appellant might be taken at

any time on three days' notice; that such notice was then waived by the plaintiffs, and it was consented that such deposition be taken before an officer named, October 16, 1896; that, upon the cause being tried October 6, 1896, the trial judge took the cause under advisement, in order that the appellant's deposition so to be taken should be put in evidence; that the same was so put in evidence; that November 17, 1896, and after the final adjournment of said term, the trial judge, in pursuance of such stipulation, made and filed his findings, with a direction that judgment be entered thereon as of October 6, 1896; that November 25, 1896, judgment was entered thereon as of October 6, 1896; that November 27, 1896, notice thereof was given to the appellant; that no objection was made to such findings or judgment until December 1, 1896, when the appellant filed exceptions on the ground that the findings authorized a judgment otherwise than by a strict foreclosure; that thereupon the plaintiffs obtained an order to show cause why the judgment so entered should not be amended and modified so as to provide for a strict foreclosure of the contract instead of the provision therein contained for a foreclosure and sale of the premises, and for a judgment for deficiency against the appellant, and why said judgment should not be modified in other respects, and conform to such amendment, and the same came on to be heard at the December term of the court, and, the appellant appearing by his counsel, and *objecting* to the same on the ground that the court was without power to so amend or modify after the term at which the findings and judgment had been so entered and passed; and the court accordingly denied such motion, with $10 costs, December 17, 1896.

It is manifest from such conduct of the appellant that he was more anxious to have delay than he was to have the judgment in the form of a strict foreclosure, otherwise he would have consented to such modification. Since the findings and judgment were entered after the September term

upon the stipulation of the parties, it is quite obvious that they might have been amended after that term by like consent of the parties. The refusal of the appellant to so consent is evidence that he preferred to have the judgment remain as it was, rather than to lose the opportunity of postponing the day of payment upon a mere technicality. The objection was purely technical. To allow it to prevail after the appellant had thus refused to consent to the correction would be to sacrifice the substantial rights of one party in order to stimulate the perversity and desire for further litigation by the other party. Certainly that should not be done in an equitable action like this. Such refusal to consent to such correction, when the same might have been readily done without delay and without expense, did not place the appellant in a favorable position to successfully invoke the aid of a court of equity to compel such correction after forcing the opposite party to submit to nearly two years' delay, and be to a considerable expense. This position is the counterpart of the well-settled rule which precludes a party from availing himself of an error which he might have had corrected had he called the attention of the trial court to the same at the proper time. Besides, the appellant having conveyed certain portions of the premises, as indicated in the statement, it may be unjust to have his grantees cut off by strict foreclosure, or compelled to pay more than they had agreed, when they, or some of them, may be relieved by reason of the judgment being in its present form. We must hold that the appellant has, by his conduct, precluded himself from making such objection available.

Error is assigned because the judgment requires the payment of interest from October 22, 1895, instead of from January 25, 1896; in other words, that the action was prematurely brought. This is based upon the assumption that the plaintiffs did not perfect their title to the whole of the land until they obtained and recorded the corrected Cady deed to the fifteen acres, December 16, 1895, and hence that the cash

payment did not become due until forty days thereafter, to wit, January 25, 1896. This admits, by implication, that the plaintiffs had a perfect title to all the land except the fifteen acres at the time the deeds were tendered, September 12, 1895. Upon the record before us it is manifest that the plaintiffs did then have a clear and indefeasible title to all the land covered by the mortgage; that is to say, all, unless the fifteen acres are to be excluded. The question recurs whether the appellant was justified in refusing the deeds tendered September 12, 1895, by reason of any alleged interest of the widow and heirs of Cady in the fifteen acres.

Undoubtedly he had the right to insist upon a marketable title. It appears that the fifteen acres were not covered by the sheriff's deed recorded December 17, 1859. Nevertheless it was found by the court, as stated, that William Nelson and the plaintiffs claiming under him had continued in the actual, open, notorious, and exclusive possession, including the fifteen acres, ever since December 17, 1859; that soon after that date, William Nelson, so in possession of such land, protected the same by substantial inclosures, and he and the plaintiffs had occupied and used the same for agricultural purposes, and had been in such open, notorious, and exclusive possession of the same for more than twenty years prior to July 10, 1895, claiming title thereto, and paying all taxes assessed thereon, and that none of the Cadys ever made any claim to the land, or any part thereof. There is no pretense that William Nelson so entered into possession of the fifteen acres in 1859 under Cady, or any grantor of Cady; but, on the contrary, it is found that such possession was adverse. There is plenty of evidence to support such findings. Had the widow and heirs of Cady brought an action to recover the fifteen acres on September 12, 1895, they would necessarily have been met by the statute, which declares that "no action for the recovery of real property or the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor,

was seized or possessed of the premises in question, within twenty years before the commencement of such action." R. S. 1878, sec. 4207. After twenty years of peaceable and uninterrupted adverse possession a grant will be presumed. *Rooker v. Perkins*, 14 Wis. 79; *Scheuber v. Held*, 47 Wis. 340; *Bartlett v. Secor*, 56 Wis. 520; *Toomey v. Kay*, 62 Wis. 106; *Carmody v. Mulrooney*, 87 Wis. 552; *Lampman v. Van Alstyne*, 94 Wis. 417; *Wilkins v. Nicolai*, *ante*, p. 178.

In *Greenblatt v. Hermann*, 144 N. Y. 13, the defendant derived title under sale by administrators of N. pursuant to a decree of the surrogate court, August 10, 1881, to pay debts. April 13, 1892, the plaintiff agreed to purchase of the defendant for $19,500, and pay down $1,500. May 26, 1892, the defendent tendered a deed, but the plaintiff objected that the administrators' sale was defective on the ground that the petition did not purport to set forth the names of all the heirs of decedent as required by the statute. But it was held that the plaintiff made no case for recovering back the purchase money paid. In that case it was held that "a vendee of real estate, who refuses to take title on the ground of defect therein, must point out the objection, and give proof tending to establish it, or to create such a doubt in respect thereto as to make the title unmarketable." In *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400, it was held that the possibility of debts against the estate of one through whom the vendor claims title, in the absence of affirmative proof thereof, was no cloud on the title, and would not prevent specific performance of the contract being decreed. In that case the vendor claimed title from the intestates whose estates remained unsettled. In *Webb v. Chisolm*, 24 S. C. 487, it was held that a purchaser cannot be compelled to take a doubtful title, but the court acts on moral certainty, and a purchaser will not be permitted to object to a title on account of a bare possibility.

In *Hedderly v. Johnson*, 42 Minn. 443, it was held: "To make a title to real estate unmarketable, so that specific per-

formance of a contract to convey will not be enforced against the vendee, there must be a reasonable doubt as to its validity. If the doubt raises a question of law, it must be a fairly debatable one,— one upon which the judicial mind would hesitate before deciding it. If the doubt depend on a matter of fact, and there is no doubt as to how the fact is, and if it may be readily and easily shown at any time, it does not make the title unmarketable." In that case Chief Justice GILFILLAN, speaking for the whole court, among other things, said: "Courts will not compel a vendee to take an unmarketable title when he has stipulated for a good one; and a title is deemed unmarketable, within this rule, where, although it may be good, there is a reasonable doubt as to its validity. The term 'reasonable doubt' is always used in this connection, because, as a doubt might be suggested or question raised as to most titles, it would go far to do away with the remedy by specific performance if a mere doubt raised, without regard to its character, were permitted to defeat the action. A doubt as to the title may be raised upon a question of law, or upon a question of fact, or upon both law and fact. It is impossible to state any precise and definite rule by which to determine when a doubt raised upon a question of law is to be deemed reasonable. Without going so far as some of the English cases, we can at least say that the doubt suggested must raise a question of law that is fairly debatable,— one upon which the judicial mind would hesitate before deciding it. . . . On the other hand, if there is no doubt as to how the fact is, and it may be readily and easily shown at any time, the title is not rendered doubtful by depending upon it. Thus, where the title depends on the bar of the statute of limitations, and it clearly appears that the real owner is barred, it is a marketable title. *Pratt v. Eby*, 67 Pa. St. 396. In such case the evidence to establish it must, from the nature of the fact, be easily accessible." The Pennsylvania case cited clearly sustains the position.

It has been held in this state that a tax title may be a marketable title. *Gates v. Parmly*, 93 Wis. 295. That a title depending upon the statutes of limitation may be marketable is supported by numerous adjudications. In addition to authorities cited in the brief of counsel for the plaintiff, see *Seymour v. De Lancey*, 1 Hopk. Ch. 436; *S. C.* 14 Am. Dec. 552; *Murray v. Harway*, 56 N. Y. 344; *Shriver v. Shriver*, 86 N. Y. 576; *Irving v. Campbell*, 121 N. Y. 353. Under the pleadings the plaintiffs were at liberty to show that the alleged Cady claim had been barred by the statute of limitation. *Morgan v. Bishop*, 56 Wis. 284; *Mead v. Nelson*, 52 Wis. 402; *Gould v. Sullivan*, 84 Wis. 665. Besides, it is at least very questionable whether a vendee who has affirmed the contract by conveying away portions of the premises by warranty deeds can rightfully refuse to perform any portion of his contract merely because there is a failure of record title to a small fraction of the land. We must hold that the plaintiffs tendered deeds of a good marketable title to all the premises described, September 12, 1895.

This makes it unnecessary to consider the questions of interest and costs discussed by counsel for the appellant.

By the Court.— The judgment of the circuit court is affirmed.

PHILLIPS, Respondent, vs. CARVER and wife, Appellants.

99 561
103 435
104 291
99 561
105 329
99 561
115 238

April 18 — May 24, 1898.

Pleading: Demurrer ore tenus: *Misjoinder of causes of action: Waiver: Specific performance: Election.*

1. Upon a demurrer *ore tenus* to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, the complaint will be construed liberally with a view to substantial justice, and all reasonable presumptions will be allowed in its

favor. The objection that two causes of action have been improperly united cannot be raised by such a demurrer.

2. Under the provisions of sec. 2654, R. S. 1878, the objection that several causes of action have been improperly joined is waived if not taken by demurrer or answer.

3. Where two causes of action are stated in the complaint, it is within the discretion of the court to require the plaintiff to elect under which cause he will proceed, and its ruling will not be disturbed on appeal except in case of an abuse of such discretion.

4. When the time for performance is made essential by the terms of a contract or by a reasonable notice to the party in default, the party who is entitled to declare the contract forfeited for a default may waive his right to do so, either expressly or by conduct which is consistent only with a purpose on his part to regard such contract as still subsisting and not ended by the default.

5. H., having been put in possession of land under an executory contract with W. for the purchase thereof, by which payment was required to be made in instalments and failure to pay any instalment rendered the contract void, paid some interest but made default in paying an instalment of the principal, and thereupon W. insisted that he should pay the same as soon as he possibly could. W. afterward conveyed the land to C. by a deed which expressly stated that it was "subject to a written contract with H.," which the grantee agreed to comply with, and C. entered upon the land and made improvements. In an action by P., to whom H. had assigned his contract, against C., to whom he had tendered payment of the whole amount due within a reasonable time after notice, to recover possession of the land and to compel a conveyance thereof, *held*, that the default had been waived and that he was entitled to the judgment demanded in his complaint.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Appeal from a judgment of specific performance of a land contract, in favor of the plaintiff and against the defendants, for eighty acres of land. The complaint was in form the same as in an action of ejectment; stating that plaintiff was the owner and entitled to the possession of the premises, and that the defendant unlawfully and wrongfully entered upon the premises, and withholds the possession thereof, etc.

On November 23, 1893, William S. Warner, being the owner of the land, entered into an agreement in writing with one Levi Holmes to sell and convey the same to him for the agreed price of $240, payments to be made as follows: $25 at the delivery of the contract; $50 in one year, with seven per cent. interest thereon; $50 in two years, and $50 in three years, and $65 in four years, with interest at seven per cent. on the sums remaining unpaid. Holmes paid the sum of $25 when the agreement was signed, but failed and neglected to pay the first payment of $50 which became due and payable November 23, 1894, and $50 which became due and payable November 23, 1895. By the terms of the agreement it was expressly stipulated and agreed that, if the said Holmes "should fail to make any of the payments of purchase money specified at the time and in the manner specified in such case, the agreement should be henceforth utterly void, and all payments thereon forfeited, subject to be revived and renewed by the act of the said Warner, or the mutual agreement of both parties." The agreement was acknowledged and recorded. November 12, 1895, Holmes assigned the contract to the plaintiff, and the assignment was duly witnessed and acknowledged, and recorded December 11, 1895. There was an indorsement on said contract of the receipt of $15.05 for one year's interest, due November 23, 1894, under date of April 20, 1895.

The defendants denied all the allegations of the complaint, and alleged that the defendant *C. S. Carver* was then, and at the time of the commencement of the action, the owner in fee of the premises, holding the same by virtue of a deed of conveyance from said W. S. Warner recorded in the office of the register of deeds for said county, in volume 88, page 306; and further denied that any valid assignment was ever made of the land contract mentioned in the complaint to the plaintiff, *Phillips;* and denied, also, that *Phillips* had any right, title, or interest in the land described in the complaint,

and alleged that all the right, title, and interest of said Holmes in said land had been forfeited by his failing to comply with the terms and conditions mentioned and set forth in the contract of purchase, by failing to make payments as therein required. And the said defendant *Carver* further answered that since he purchased said lands he had made valuable improvements thereon, to the amount of $350, and by way of counterclaim alleged that the land contract mentioned and described in the complaint was made and delivered by said Warner to Levi Holmes upon the express condition that Holmes should make payments on the principal sum payable under said contract, with interest, at the time and in the manner mentioned in said contract, and that, if he should fail to make any of the payments as specified, said land contract should be henceforth utterly void, and all payments thereon forfeited; that thereafter, on November 23, 1894, he failed and neglected to pay the sum of $50, which became due and payable under said agreement, although requested so to do by said W. S. Warner, and the said contract thereby became null and void, and was never afterwards revived or renewed by the said W. S. Warner or by the defendants, or either of them. The defendants alleged that said Holmes fraudulently pretended to assign said contract to the plaintiff, *Phillips*, but that said pretended assignment was made without any valid consideration whatever, and was made for the purpose of creating a cloud upon the title of defendants' said land, and that said Holmes well knew the fact when he took the assignment. The defendants demanded judgment that the plaintiff's complaint be dismissed, and that the contract mentioned and described in the complaint be declared null and void, and canceled, and that the defendants recover judgment for their costs.

At the trial the defendants objected to any evidence under the complaint, for the reason that it did not state facts sufficient to constitute a cause of action, and for the reason that

it appeared upon its face that two causes of action had been improperly joined,— one in equity and one at law. The objections were overruled. They then moved that the plaintiff be compelled to elect which cause of action he would proceed under, but this was denied.

The plaintiff produced in evidence an assignment to himself of the land contract to L. Holmes, and testified that he was a brother-in-law of said Holmes; that the consideration of the assignment was $1, and a doctor's bill he had against said Holmes, of about $40; that when he bought the land there was about an acre cleared, and some fences on it. He further testified that he knew Warner in his lifetime, and first learned that defendant *Carver* claimed an interest in this land November 12, 1895; that he tendered payment to *Carver* on the contract on the 18th of January, 1896, at his residence, of the sum of $117.55, and sent the money December 23d to *Carver*, by his hired man; that he did not take it; that "he [*Carver*] said I was too late; that I had forfeited the contract;" that *Carver* was then living in Bovina; that he built a house on the land, cut off the timber from three or four acres, and piled it up; that the value of the improvements was about $50 to $75, and possibly $100; that the value of the Holmes improvements when he (*Phillips*) bought the land was about $25, and that he estimated the value of the timber cut by *Carver* from the land at about $200; that he did not know that Holmes was in default at the time he took the assignment of the contract; that Holmes told him (*Phillips*) that Warner had deeded the property to *Carver* after the papers were transferred to plaintiff.

Levi Holmes testified that he was the party named in the contract, and bought the land by it from W. S. Warner on the date given, and he remembered afterwards of selling it to the plaintiff, *Phillips;* that he cleared about an acre — possibly two acres — of it; that he never lived on the land; worked part of it; raised potatoes and buckwheat on it;

fenced part of it. He identified the assignment of the contract he made to the plaintiff, *Phillips*, but testified that he never paid any of the principal sum after paying the $25 down at the time the contract was made; that he should judge the improvements made by *Carver* were of the value of about $75; that the reason he deeded the land to *Phillips* was that he could not meet the payments according to the agreement, and told him to get out of it what he could; that "he was to pay me my doctor's bill I owed him, if he held the land. He did not pay any money. The doctor's bill has never been settled yet."

One Louis Shauger testified that the 18th of January, 1896, he was at *Carver's* residence, when *Phillips*, the plaintiff, offered him the money for the land. *Carver* said he was too late. *Phillips* asked him if the papers were made out to *Carver*. He said they were made out to him and his wife. He had the money in his hand, and he offered it to *Mrs. Carver*, and she refused it, and he laid it on the table. They refused to take it, and he put it in his pocket. It was $125. Otto Lind testified substantially to the same offer made by him (witness) for *Phillips* to *Mr.* and *Mrs. Carver*. They would not take the money; said it was too late. Plaintiff produced in evidence a warranty deed, made October 9, 1895, given by W. S. Warner and wife to *Warren Carver* and wife, of the premises in question.

Mrs. Margaret Warner testified that she was the widow of W. S. Warner, and was present when Holmes came and paid his interest, $15.05, April 20, 1895; that the understanding then was that Holmes should pay, as soon as possible, the principal; that there was no time given him, whatever; that Mr. Warner said he must pay the money as soon as he possibly could, and Holmes said he would try and do the best he could; that she subsequently wrote to Holmes, for Warner, telling him he must pay the principal, or he would consider the contract void; that that was

shortly before *Carver* came to buy the land; that Holmes made no reply to that; that *Phillips* called on the 12th of November, 1895; that he told Mr. Warner that he had bought the Holmes contract, and asked him how much he owed him on it; and that Mr. Warner said he had nothing more to do with it; he had sold it to *Carver*.

Plaintiff having rested, defendants moved for a nonsuit, which was denied.

The defendant *Rose Carver* testified that December 1, 1895, *Dr. Phillips* came to their house to see about some land that Holmes had a contract on, and that he had bought the contract. He said there was some money due, and that he would send the money in two or three days. She next saw him January 18, 1896. "He said he had brought us up some money to pay on contract. *Carver* told him he was altogether too late, as we considered the payment past due. He went to the table, and wanted to count out some money. I spoke to him, and said, '*Phillips*, this is the 18th of January.' I said, 'It is pretty late coming with that money.' He asked me if I would take the money. I think he asked *Carver* before that. I told him I thought it was too late; my husband said it was too late." There was evidence tending to show that the value of the improvements that *Carver* and wife had made since they got the deed from Warner was $300. *Warren Carver* testified that the 1st of December, 1895, *Phillips* came to his house, and stated he had some money to send him in two or three days, and that he told him he considered it too late altogether, and that, if Holmes had come to him *at the time the payments were due*, he certainly should have given him a deed; he did not consider himself under obligation to take any money on that, so that he need not send anybody up with it; that subsequently, on the 18th of January, 1896, *Phillips* came and counted out something like $117, and asked if they would take the money, but he said he considered it too late to take money

now. *Phillips* picked up what he had, and they talked about making a compromise.

There was evidence given tending to show that the plaintiff, *Phillips*, informed *Carver* November 14, 1895, *that he was ready to pay all sums due on the contract*, and showing that the defendants on the 25th of November, 1895, gave notice to Holmes, of whom plaintiff, *Phillips*, purchased, that they had purchased from Warner the premises in question, and held his warranty deed therefor, "subject to contract of sale *therefor to you*, dated November 23, 1893; consideration, $240; payments to be made as follows: $25 to be paid at the date of said contract; $50 in one year thereafter, with seven per cent. interest; $50 in two years, with seven per cent. interest, to be paid annually; $50 in three years, with seven per cent. interest, to be paid annually; and $65 in four years, with seven per cent. interest thereon, to be paid annually,—and that there is now due and unpaid on said contract $50 which became due November 23, 1894, and $50 which became due November 23, 1895, with seven per cent. interest thereon from and after November 23, 1894; and we hereby *demand that you pay said sum of $100, with interest thereon due as aforesaid, to us at once, or else we will declare said contract utterly void, and all payments thereon forfeited.*" A warranty deed of the premises from W. S. Warner and wife to the defendants, *Carver* and wife, was put in evidence; and said deed stated that it was made "subject to a written contract for the sale of said land to Levi Holmes, dated November 23, 1893, which contract parties of the second part *hereby agree* to comply with all the conditions thereof, on the part of the said William S. Warner, one of the parties therein, and the said Levi Holmes complying with the conditions of said contract on his part agreed therein, as in said contract agreed to be performed."

The court found that the plaintiff was the owner of the land and premises described in the complaint; that William

S. Warner, November 23, 1893, sold them to Levi Holmes for $240, and that the defendants wrongfully entered upon the premises and dispossessed the plaintiff, and still wrongfully and unlawfully occupied and withheld the same; that said land contract gave the possession of the premises to Levi Holmes, and that November 23, 1893, he (Holmes) took possession accordingly; that November 12, 1895, for a valuable consideration, he sold and conveyed the premises and possession thereof to the plaintiff by conveyance and assignment in writing duly executed and delivered, and that on that day said Holmes and said plaintiff, *Phillips*, wholly performed all conditions and agreements according to said land contract and conveyance, and made payment of interest thereon according to said land contract; that the said plaintiff on November 21, 1895, tendered the principal and interest then due to W. S. Warner, in person, at the city of Appleton, to wit, the sum of $115.05; that at said time said Warner informed the plaintiff that he had conveyed his interest, such as the same might be, to said defendants; that on the 3d of December, 1895, said plaintiff tendered in lawful money to the defendants all principal and interest due on November 23, 1895, namely, the sum of $115.05; that defendants refused to receive the same, and thereafter, on January 18, 1896, plaintiff again tendered in payment to said defendants the sum of $117.55; that said Warner and said defendants had at all times since refused to receive said principal and interest so tendered, and that said defendants, by assignment and conveyance from W. S. Warner and wife dated October 9, 1895, purchased and received, for a consideration of $229.40, all the rights of W. S. Warner, as aforesaid mentioned, in said land contract, and that said conveyance contained the following clause, to wit: "This deed is made subject to a written contract for the sale of said land to Levi Holmes dated November 23, 1893, which contract parties of the second part hereby agree to comply with all the conditions

thereof on the part of said William S. Warner, one of the parties of the first part herein, on the said Levi Holmes complying with the conditions of said contract agreed to be performed;" that said defendants took said deed and conveyance with full notice and knowledge that said Holmes and said plaintiff were the owners of said premises, and entered into possession of the same; that the sum of $15.05 interest was paid by said Holmes, and received by W. S. Warner, April 20, 1895, and duly indorsed upon said land contract, *with the understanding* that the $50 principal would be paid at a future date, with seven per cent. interest; that on November 23, 1895, the sum of $100 principal and $15.05 interest became due, which amount was legally tendered to said W. S. Warner and to said defendants as aforesaid; that $50 additional principal, with $15.05 interest, became due and payable November 23, 1896, after the commencement of this action; that the sum of $65 principal, with interest at seven per cent., became due and payable from said plaintiff to said defendants; the sum of $180.10, with interest thereon at seven per cent., since November 23, 1896, and the further sum of $65, with seven per cent. interest thereon from November 23, 1896, was to become due and payable November 23, 1897; that the damages to the plaintiff by the withholding of said premises by the defendants, together with the value of the hay and timber cut down and removed therefrom by them, is the sum of $125; that the defendants are entitled to the value of the improvements made on said premises, which are as follows: $350, above the material used in making the same, and which was taken from said premises, less the value of rents and profits of said premises while said plaintiff was dispossessed of the same; that the facts as alleged in the complaint are true.

As conclusions of law the court found that the plaintiff, *Phillips*, was entitled to the possession of the premises, being the grantee and legal representative of Levi Holmes and of

W. S. Warner, prior to said defendants; that the defendants wrongfully occupy said premises, and unlawfully dispossessed the plaintiff of the same; that the plaintiff had the right to make payments in the place of Holmes, and receive a deed for said premises on complying with the terms and conditions of said land contract; that there is now due and payable to said defendants from said plaintiff, according to the terms of said contract, the sum of $180.10, with interest thereon from November 23, 1896, and that there would become due and payable the further sum of $65 on the 23d day of November, 1897; that when the aforesaid amount that is due, and the amount that is to become due, shall have been fully paid by the plaintiff to the said defendants, said defendants are legally bound to, and they shall and must, execute a good and sufficient warranty deed, conveying to the plaintiff said premises, and all right, title, and claims that they acquired from said W. S. Warner, according to the terms and conditions of said land contract; and that said plaintiff, *Phillips*, should pay, or cause to be paid, to said defendants, the sum of $225, being the difference of the value of improvements made by defendants, less the damages aforesaid by withholding the same, and less the waste committed by said defendants at the time of the commencement of this action; that the plaintiff is entitled to judgment and an order restraining said defendants from committing any further waste, and is entitled to an order and execution accordingly; and that the plaintiff have judgment as aforesaid, and for the costs and disbursements in the action.

From a judgment entered substantially in accordance with said findings, the defendants appealed.

For the appellants there was a brief by *Duffy & McCrory*, and oral argument by *J. H. McCrory*. To the point that specific performance will not be decreed where it would be

inequitable, or where the party seeking it was in default without excuse, they cited *Hay v. Lewis*, 39 Wis. 364; *Williams v. Williams*, 50 id. 316; *Crowley v. Hicks*, 72 id. 539; *Rogers v. Van Nortwick*, 87 id. 429; *Combs v. Scott*, 76 id. 667; *Docter v. Furch*, 91 id. 477; *Seymour v. Delancey*, 6 Johns. Ch. 223; *Smith v. Wood*, 12 Wis. 382; *Wells v. Millet*, 23 id. 64; *Tiernan v. Gibney*, 24 id. 190; *Eaton v. Eaton*, 15 id. 259; *Hanson v. Michelson*, 19 id. 498; *Colson v. Thompson*, 2 Wheat. (Brightly's notes), 336; *McIver v. Kyger*, 3 id. 53; *Dorsey v. Packwood*, 12 How. 126; *Boone v. Missouri Iron Co.* 17 id. 340; *McNeil v. Magee*, 5 Mason, 244; *Kendall v. Almy*, 2 Sumner, 278; *Denniston v. Coquillard*, 5 McLean, 253.

For the respondent the cause was submitted on the brief of *Whitman & Ryan.*

PINNEY, J. The objection of the defendants to any evidence under the complaint was rightly overruled. Upon a demurrer *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, the complaint will be construed liberally, and with a view to substantial justice; and all reasonable presumptions will be allowed in its favor. *Hagenah v. Geffert*, 73 Wis. 636; *Teetshorn v. Hull*, 30 Wis. 162. Extended discussion is not required to show that the complaint states substantially a cause of action for specific performance of the contract of November 23, 1893, and recovery of the lands described therein. The objection that two causes of action had been improperly united could not be raised by demurrer *ore tenus.* The defendants, having answered the complaint, had waived that objection by failure to take it by answer or formal demurrer. "If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the

court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." R. S. 1878, sec. 2654.

Whether the plaintiff should have been required to elect under which claim or cause of action he would proceed, was a matter within the discretion of the court, and there is nothing to show any abuse of such discretion. This ruling cannot be assigned as error.

W. S. Warner was the owner of the land, and both parties claimed by title derived under and through him. He executed to Holmes the contract, which the latter transferred to the plaintiff, *Phillips*, November 12, 1895. The contention that *Phillips* had forfeited all rights he ever had under the contract seems to be satisfactorily answered by the deed from W. S. Warner and wife to the defendants, dated October 9, 1895, put in evidence, which, as to Warner and the defendants claiming title under him, was clearly a waiver of the objection of lapse of time in the performance of the contract. The testimony of Mrs. Warner was that Holmes paid $15.05, April 20, 1895, as interest on the contract, and which Warner received. She testified, also, that the understanding then was that Holmes should pay, as soon as possible, the principal,—"there was no time given him whatever;" that Warner said "he must pay the money as soon as he possibly could;" that she subsequently wrote to Holmes, for Warner, to the effect that he must pay the principal, or he would consider the contract void, and this was *shortly before* the defendant *Carver* came to buy the land. It appears by this testimony and the deed from Warner and wife, under and through which the defendants claim, that Warner had waived any forfeiture that could be claimed by reason of delay or failure to make prompt payment, and Holmes was still being indulged by Warner as to further time. It appears that *Phillips* called on Warner the 12th of November, and told him that he had bought the Holmes contract,

and asked him how much he owed him on it. Mr. Warner said he had nothing more to do with it; he had sold it to *Carver*. It appears by the testimony of the defendant *Rose Carver* that December 1, 1895, *Phillips* came to their house to see about the land that Holmes had a contract on; that he had bought the contract; that he said there was some money due, and he would send the money in two or three days; that she next saw him January 18, 1896, when he said "he had brought us up some money to pay on contract, and *Carver* told him he was altogether too late, as we considered the payment past due." The testimony shows some further ineffectual negotiations on the part of the plaintiff to induce the defendants to take the money, and that the defendants said they were under no obligation to take any money on the contract. However, the plaintiff counted out to them $117; and, upon their insisting that it was too late, he picked up the money, and they talked about a compromise. There was evidence tending to show that the plaintiff, *Phillips*, informed the defendant *Carver*, November 14, 1895, that he was ready to pay all sums due on the contract, and that the defendants on the 25th of November gave notice to Holmes that they had purchased from Warner the premises in question, and held his warranty deed therefor, "subject to contract of sale therefor to you dated November 23, 1893," and stating the time within which the several payments of principal and interest were to fall due, and demanding that he should pay said sum of $100, with interest, on said contract, at once, or they would declare said contract utterly void, and all payments thereon forfeited. It thus appears that at this date the defendants, as assignees of the contract, were insisting on its validity and performance on the part of the plaintiff. Their interest in the land was taken expressly subject to the provisions of the written contract to Holmes, which had been transferred, and was then held by the plaintiff, *Phillips;* and these provisions, and such de-

mand of payment, in connection with other facts and circumstances in evidence, amounted to a valid and sufficient waiver by both Warner and the defendants of the default of payment of principal and interest that had then occurred.

The stipulation in the contract that if Holmes, the vendee, should fail to make any of the payments of purchase money at the time and in the manner specified, in such case the agreement should be henceforth utterly void, and all payments thereon forfeited, subject to be revived and renewed by the act of the vendor, or the mutual agreement of both parties, had the effect to render payment of the purchase money at the time and in the manner specified material to the contract. But whenever time is made essential, either by the nature of the subject matter and object of the agreement, or by express stipulation, or by a subsequent notice given by one of the parties to the other, the party in whose favor this quality exists (that is, the one who is entitled to insist upon a punctual performance by the other, or else that the agreement be ended) may waive his right, and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly, or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default. Accordingly, if either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of the agreement on his side, the other party may, by notice, fix upon and assign a reasonable time for completing the contract, and may call upon the defaulting party to do the acts to be done by him, or any particular act, within this period. The time thus allotted then becomes essential, and, if the party in default fails to perform before it has elapsed, the court will not aid him in enforcing the contract, but will leave him to his legal remedy. The notice cannot be an arbitrary and sudden termi-

nation of the transaction. It cannot put an immediate end to a pending dispute or negotiation as to the title. It must allow a reasonable length of time for the other party to perform. And, if it fails in any of these respects, it may be disregarded, and will produce no effect upon the equitable, remedial rights of the party to whom it is given. The nature and object of the contract, the circumstances of the case, and the previous conduct of the parties, are important, and, indeed, controlling, elements in determining the reasonableness of the notice. The notice, also, to be effectual in making the time allotted an essential element of the performance, must be express, clear, distinct, and unequivocal. After time has been thus made an essential element of the contract, by a reasonable notice given during the negotiation concerning its performance, the notice and its effect may be waived by the conduct of the party giving it; and if the time is once allowed to pass, and the parties still go on negotiating for the completion of the purchase, this conduct amounts to a waiver, and time *is then no longer essential.* Pomeroy, Contracts, §§ 394–397.

The defendants acquired their rights in the premises by the deed from Warner and wife, which stated that it was made subject to a written contract for the sale of said land to Levi Holmes November 23, 1893, with which contract parties of the second part agreed to comply, and took said deed and conveyance with full notice and knowledge that said Holmes and the plaintiff were the owners of said premises, and had entered into possession of the same. It further appears that the sum of $15.05 was paid by Holmes on account of said contract, and received by Warner, April 20, 1895, and duly indorsed upon the said land contract, with the understanding that the $50 principal would be paid at a future date, with seven per cent. interest; that on November 23, 1895, the sum of $100, principal, and $15.05, interest, became due, which amount was legally tendered to said

Warner and to said defendants as aforesaid. They stood in the place of Warner, and were bound and affected by all equities existing against him in respect to the premises. The provisions of the written contract for the sale of the land to Holmes, dated November 23, 1893, recited and referred to in said deed of October 9, 1895, amounted to a legal waiver by Warner, who executed the deed, and by the defendants, who accepted it, of all defaults of payment of principal and interest that had matured and were then past due on the contract; and it seems but just that their demand of the payment of the purchase money secured by said contract should have the like effect. These acts of waiver occurred prior to the time the defendants acquired their claim of title. It does not appear that Warner, or the defendants as his assignees, did anything after they had acquired their interest to fix the time of payment, or make it material or essential to the contract. It seems, therefore, that the plaintiff had not forfeited his equitable rights in the premises at the time he tendered to the defendants payment of the money due on the contract in December, 1895, and demanded of the defendants a conveyance of the premises.

The imperfect and anomalous condition of the pleadings, and the peculiar character of the issues developed, have resulted from the irregular course of pleading to which the parties have resorted. The matters set up in the complaint and answer are clearly material and important to a determination of the rights of the parties in and to the premises in dispute. They are in part of a legal, and in part of an equitable, nature; and, although not brought before the court by any regular or permissible course, evidence was directed to, and proper findings have been made on, all these subjects, so that no difficulty existed, in view of the findings of the trial court, of stating and adjudging the sums to be allowed or adjudged to each of the parties, and embracing them in a final judgment. It would doubtless have been

more in conformity with correct practice had the court, on motion before trial, required the pleadings to be reformed so as to have produced issues more in accordance with correct practice in actions of ejectment, in which there are legal and equitable controversies to be determined, but no attempt in that direction seems to have been made. It does not now appear necessary or essential to the ends of justice to set aside these findings, and put the parties to the expense and delay of another trial, in order to vindicate a mere matter of method or form of procedure or trial, when it is evident that the parties have had a fair investigation and determination of the matters in controversy. The court had jurisdiction of the parties, and authority to hear and determine the entire controversy. In fact, it would seem that the parties, respectively, have waived all right to object to the method of procedure adopted, and have substantially consented to it.

We perceive no reason why, in the condition of the issues at the time of the trial, evidence might not have been properly received to show what sum remained due and unpaid from the plaintiff to the defendants for unpaid purchase money, and interest thereon, or what sum should be allowed to them for improvements made on the premises while they held and occupied the same, excluding the plaintiff from the possession thereof, or what sum should be allowed to the plaintiff by way of damages or for waste, as against the defendants. Evidence has been directed to, and proper findings have been made on, these and all subjects of controversy contained in the record, so that no practical difficulty existed, in view of the findings of the trial court, of stating and adjudging the sum which should be allowed or adjudged to each of the parties, and embraced in the final judgment. The situation was plain, and, we must assume, well understood by both parties, when the defendants' demurrer *ore tenus* was overruled. They took no steps to extricate the

case from the situation in which it had been placed by their failure to pursue the course of practice the law had provided, and we see no substantial objection to the result arrived at.

By the Court.— The judgment of the circuit court is affirmed, with costs.

BRATT, Respondent, vs. SWIFT and others, Appellants.

May 3 — May 24, 1898.

Damages for conspiracy: Credibility of witnesses.

1. One who is driven out of business by a conspiracy in restraint of trade, and compelled to sell his property for less than its value, is entitled to recover, as damages therefor, such sum as would measure his loss of profits and also loss by diminution in the value of his property by reason of the unlawful acts of the defendants.
2. To instruct a jury that "if a witness has sworn falsely as to any material matter you are at liberty to disregard his entire testimony," is erroneous, if not qualified by such a clause as "unless such testimony was corroborated by other credible evidence."

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

The plaintiff was a retail butcher at Superior, Wisconsin, between December 1, 1893, and April 15, 1895. On the latter date, he alleges that he was forced by the restraint of trade and the interference therewith, caused and brought about by the defendants, to sell out his business and abandon the same, and engage in other enterprises to make a living; that he had made net profits and gains in his business of about $4,000 a year over and above all expenses, and could have continued to have made that much had his business not been overthrown by the defendants as alleged; that they entered into an agreement, contract, and conspiracy to and with themselves, and with others, in restraint of trade,

in particular the retail butcher trade in the city of Superior and its suburbs, to menace, hinder, and control the plaintiff in his said business of a retail butcher, and drive him out of his means of livelihood, and lessen his profits, and ruin his business, which combination was called "Retail Butchers' Association," having a constitution and by-laws, showing a part, but not all, of the purposes of said conspiracy and combination; that some of its purposes were to monopolize the sale of butchers' meats in Superior, at the expense of the people, and to control that trade, and manage the same, solely in their own interests and others united with them, and to coerce plaintiff into joining said combination, monopoly, and conspiracy against his will, and to drive him out of business in case he refused to join, and, to that end, they reported to all the defendants that he (said plaintiff) would not join said combination, and that he had been guilty of unmercantile conduct, promoting excessive competition, house-to-house peddling, selling adulterated goods, etc., in consequence of which the defendants, the packing companies, refused to sell the plaintiff meats or goods of any kind in which they were dealing, except for prices far above those at which they sold and were selling to the other defendants and other members of said Butchers' Union, and refused to sell goods to plaintiff except for sums far in excess of the market price for goods he wished to purchase, and the retail butchers, in like manner, and in pursuance of said scheme, refused to sell to plaintiff goods they had for sale, and which he wanted to buy, except for prices far above the market prices, and in excess of prices charged by them to other people; that, in consequence of said conspiracy, plaintiff became unable to purchase meats and other goods needed in his business, and, to all practical intents and purposes, all wholesale dealers in Superior and Duluth were in the conspiracy, and his business was ruined, and he was forced to sell out, which he did April 15, 1895; that they sought to make him

join the Butchers' Union, at an expense of $25 a year, or, in the alternative, to ruin his business; and said boycott or refusal to sell was still maintained by the defendants as against the plaintiff, and he was prevented from engaging in the retail butcher business, and from earning a living thereby for himself and family, and whereby also he was compelled to make a forced sale of his building at the place aforesaid, and of his stock of goods and ice stored for use in his business, and lost thereby $600, to which extent he was specially damaged by the defendants by said conspiracy and other acts in pursuance thereof; and the defendants inflicted general damages to the plaintiff of about $1,300. The answer put in issue, and in substance denied, all the allegations of the complaint.

The evidence was very lengthy and elaborate, and a large number of witnesses were examined, their testimony extending over several hundred pages. It appeared from the evidence that the plaintiff sold and transferred to one Charles Eastlund, of Superior, his place of business, on Thompson avenue, horse and wagon, harness, ice, meat block, safe, and all tools in said building, etc., April 15, 1895, when he went out of the butcher business. Eastlund took possession of the place after the plaintiff sold out. The action was founded on the provisions of ch. 219, Laws of 1893. The plaintiff, in order to prove the damages that he alleged he had sustained, offered to, and did, give evidence as to the value of the horse, butchers' tools, scales, ice, chopping blocks, implements, and various other articles, at the time he sold out his said business to Eastlund; but the testimony was objected to as irrelevant, immaterial, and incompetent, and as tending to establish an improper measure of damages. The objection was overruled, and the defendants excepted. No evidence was produced showing the value of said several articles or pieces of property when the said plaintiff purchased the same, or what he paid therefor at the time he commenced his business.

The court instructed the jury that "the essence of the charge of conspiracy is a common design, by two or more persons, to do an unlawful act, by unlawful means;" that they should be satisfied of the existence of this common design to a reasonable certainty, and by a preponderance of the evidence, and, before they should find any defendant guilty of such charge, they should be likewise satisfied that he knew of such common design, or of a portion thereof, and that he aided or abetted in furthering it, or expressly or tacitly acquiesced therein; that, if the plaintiff was entitled to recover against any or all of the defendants, they should award him such sum as he had suffered in his business or property by reason of the alleged illegal acts of the defendants, and, among such elements of damage, they might include loss to his business, if any, from the time he claims they began to interfere therewith until the time he sold out; and if they found from the evidence that he was forced to sell out, and was obliged to sell at a loss, by reason of the alleged illegal acts of the defendants, then they might consider such loss as a part of his damages; but that, before they could award him damages, they must be satisfied from all the evidence that such damages were caused by reason of the alleged illegal acts of the defendants, or some of them,— that is, that such damages were the necessary, direct, and immediate result of defendants' acts,— and they would award him such sum, if any, as in their judgment the evidence warranted, bearing in mind that it was the duty of the plaintiff to dispose of his business and property, if forced by defendants to sell out, at market values thereof, or at a better price if obtainable; that the burden of proof was upon the plaintiff to satisfy the jury to a reasonable certainty, and by a preponderance of the evidence, of the truth of the allegations contained in the complaint,— that is, the burden of proof was upon the plaintiff to prove his case to a reasonable certainty, and by a preponderance of the evidence; that if, as to any controverted question of fact, the

evidence was so evenly balanced that they were unable to determine upon which side the truth lies, then, as to such controverted fact, they would find against the party upon whom the burden of proof lies to establish it.

There was evidence before the jury tending to sustain the issue on the part of the plaintiff, and tending to show that he was entitled to a verdict.

The court further instructed the jury: "If you are satisfied from the evidence that any witness has willfully sworn falsely to any matter or thing material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness. There are two points in this instruction to which I call your special attention, namely — First, that such false swearing must be wilful and intentional, and not the result of inadvertence, forgetfulness, or misunderstanding; and, second, that it must relate to some matter or thing material to the issues of the case, and not to something which is not in any way connected with or material to such issues." The defendants excepted to said instruction.

The jury found a verdict in favor of the plaintiff for $450. A motion was made to set aside the verdict and for a new trial, which was denied. Judgment was entered upon the verdict in favor of the plaintiff, and against the defendants, from which the defendants appealed.

For the appellants there was a brief by *Ross, Dwyer & Hanitch*, and oral argument by *W. D. Dwyer*.

D. E. Roberts, for the respondent, argued, among other things, that the defendants were liable for all the direct injury to the plaintiff resulting from their acts, though it could not have been contemplated as a probable result of such acts. *Brown v. C., M. & St. P. R. Co.* 54 Wis. 355. They were therefore liable for the plaintiff's loss of profits in business for two months, and for the difference between the price he got for the property sold and its real value. *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848. The charge in respect

to wilful false swearing was correct. *Allen v. Murray*, 87 Wis. 46; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 id. 38; *Omaha & R. V. R. Co. v. Krayenbuhl*, 48 Neb. 553; *Little v. Superior R. T. R. Co.* 88 Wis. 402; *Cahn v. Ladd*, 94 id. 134.

PINNEY, J. 1. The admission and reception of the evidence offered by the plaintiff as bearing upon his damages, to show the value of the several articles or pieces of property which he sold to Eastlund, and the prices for which he sold them when he sold out his business, was erroneous. The evidence in the form offered tended to establish an erroneous rule of damages, and one for which the defendants could not, under the circumstances as they appeared, be held liable. The wrongful acts imputed to the defendants did not injure, or destroy, or deprive the plaintiff of the use of, his property. The most that can be said is that the acts of the defendants rendered the use of it less valuable in the particular business in and for which it had been purchased or procured. There was no evidence offered or given to show that the personal property in the shop or place of business had been in any way injured, or had depreciated in value, by or on account of the alleged conspiracy. The plaintiff was not entitled to measure his damages as if his property had been entirely destroyed. He was entitled to recover, as damages, such sum as would measure his loss of profits and also loss by diminution in the value of his property by reason of the wrongful acts of the defendants; but such finding was required to be based upon legal evidence, and not upon mere conjecture or guesswork.

2. The instruction to the jury in respect to the credibility of the evidence — that, if they were satisfied from the evidence "that any witness had wilfully sworn falsely as to any matter material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness"—

was erroneous, the court failing to add to it the qualifying clause, "unless such testimony was corroborated by other credible evidence." *Mercer v. Wright*, 3 Wis. 645; *Morley v. Dunbar*, 24 Wis. 185; *Allen v. Murray*, 87 Wis. 46. The rule on this point, as stated in *Morley v. Dunbar*, *supra*, has for many years been established, and is an absolute rule of evidence in this state.

For the reasons stated, the judgment of the circuit court is erroneous.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

WASHBURN COUNTY, Respondent, vs. THOMPSON and others, imp., Appellants.

May 4—May 24, 1898.

County board, power to settle doubtful claims: Bond, consideration for: Pleading defense.

The county of Washburn, having a judgment against its treasurer and his bondsmen for money lost through depositing the same in an insolvent bank, and having exhausted all legal remedies to collect the same, and the assets of the bank being in the hands of an assignee under a voluntary assignment for the benefit of creditors, and the treasurer having conveyed to the county his claim against such bank for the public money deposited therein and lost as aforesaid, which claim the county held as security for the payment of the judgment, the county board took the bond of the bank, with sureties, to secure the payment of such collateral claim in one year, and as consideration therefor, named in the bond, gave that time to the bank in which to pay such indebtedness. *Held:*

(1) That all legal remedies having been exhausted to collect the judgment, under express statutes on the subject, the duty to make further efforts to collect it devolved on the county board,

and to that end such board possessed express authority to make such contracts and do such acts as in its wisdom were necessary and proper.

(2) That the power of the county board under the statute was sufficiently broad to enable it to apply to the situation the rules of business conduct by which a prudent person is ordinarily governed under similar circumstances in his private affairs.

(3) That the doctrine that the governing body of a corporation nas no power to discharge a debt due to it without payment, does not apply to debts of questionable validity before final judgment, or debts against insolvent parties after judgment.

(4) That though a municipal board must confine its operations to the powers conferred upon it by law, and has no power to squander or give away corporate property or discharge debts against a solvent party, it may settle disputed or doubtful claims as an incident to the right to maintain and defend actions, as well as under the express power conferred by statute to make such contracts and do such acts as are deemed necessary and proper to the exercise of the powers and privileges granted to, and duties charged upon, counties.

(5) That the giving of time, without interest, for the payment in one year of a claim of doubtful collectibility, in consideration of a bond with sureties, for payment at that time, is sufficient consideration to support such bond.

(6) That the fact that members of the county board who voted in favor of taking the bond were interested in giving the bank time to pay its indebtedness, if a defense to an action on the bond, is not available unless pleaded and insisted on as such.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Affirmed.*

The action was to recover of the defendant Shell Lake Savings Bank, as principal, and the other defendants as sureties, $14,354.57 on a bond given by such bank to the plaintiff, with interest thereon from the 3d day of February, 1896. The complaint, in addition to a copy of the bond, contained appropriate allegations showing performance of all the conditions precedent to the right of the county to recover thereon if the bond was a valid obliga-

tion. The principal issues raised by the pleadings were: (1) Was fraud perpetrated on the sureties by the officers of the county in obtaining the bond? (2) Is the bond void for want of authority on the part of the county board to accept it under the circumstances?

The recitals in the bond were to the effect that $14,354.57 were theretofore deposited in the Shell Lake Savings Bank by L. H. Wang, county treasurer of *Washburn* county; that such money was received as, and in fact was, public funds of said county; that while such money was so on deposit, the bank suspended business and made a valid assignment for the benefit of its creditors; that said moneys are wholly unpaid and owing to said *Washburn* county and its treasurer; that the circuit court of said county has duly discharged said assignee and his sureties, and directed a reconveyance of the property held by him as such assignee, to the bank, to enable it to resume business; that a reassignment has been made accordingly and the bank has resumed business, and through its proper officers requested the county and its treasurer to agree not to withdraw said money from the bank till February 3, 1895. Appropriate provisions were contained in the bond, binding the principal and sureties to pay the sum mentioned therein, to wit, $14,354.57, in case the bank failed to pay the same on or before the 3d day of February, 1895.

The issues formed by the complaint and answer were tried by the court, and such trial resulted in there being filed findings of fact to the effect that the bond sued on was taken as a renewal of a former bond in substantially the same form, with the same sureties, given on the 3d day of February, 1894, and that no fraud was practiced upon the sureties in such bonds, by the officers of the county, to induce them to become parties thereto. The circumstances on which the question of whether the bond sued on is void for want of power on the part of the county board to make the arrange-

ment it did with the Shell Lake Savings Bank, and take the bonds mentioned, as part of such arrangement, as found are as follows:

On the first Monday of January, 1893, and until January 5, 1894, L. H. Wang was the county treasurer of the plaintiff, and A. C. Probert, Joseph Riley, and F. C. Bailey were the sureties upon his official bond. June 7, 1893, the defendant bank, of which A. C. Probert was the president and principal owner, made a valid assignment to A. H. Earle for the benefit of its creditors. At the time of such assignment there was to the credit of said county treasurer, in said bank, $14,178.38 as state fund, representing moneys paid by the several town treasurers to the county as their respective portions of the state tax for the year 1893; and there was also to the treasurer's credit some $1,200 of other moneys. Such proceedings were had after such assignment that January 16, 1894, judgment was duly rendered in the circuit court for Washburn county against its treasurer and his bondsmen for the moneys due from the bank to the treasurer as aforesaid, with costs and penalties, aggregating $18,807.58. Transcripts of such judgment were duly docketed and executions issued thereon and duly returned wholly unsatisfied, no property being found out of which to satisfy the same or any part thereof. January 5, 1894, Wang resigned as county treasurer, and turned over to the county his claim against the bank for the aforesaid public money deposited therein, and he was thereupon re-elected county treasurer by the county board, but said bank indebtedness thereafter remained wholly under the control of the board as county property. February 3, 1894, Probert requested the county board of said county to extend the time of payment of said bank indebtedness, and to consent to a reassignment of the bank assets, and release him from the aforesaid judgment, so that the bank might resume business, on condition, among other things, of a bond in the sum of $14,354.57, signed by

the bank as principal, with *C. C. Thompson*, *F. J. Meehan*, *P. J. Pederson*, *George W. Harrison*, *R. D. Pike*, and *M. M. Hagerty* as sureties, being given to the county to secure payment to it of said sum of money on or before February 3, 1895, the bond to be void if the bank failed to resume business, and in that event the judgment against Wang and his bondsmen, rendered as aforesaid, to remain in full force and effect.

The request was presented in the form of a proposition, which was accepted by resolution of the county board duly adopted, and thereafter a bond proposed as aforesaid, to secure payment to the county of $14,354.57, signed by the Shell Lake Savings Bank through Probert, its president, and the other defendants named herein as sureties, was delivered to the board and duly accepted by it. Thereafter, consent having been given by all the creditors of the bank with the exception of the holders of a few small claims, the circuit court duly directed a reassignment to the bank of the property held by the assignee thereof, which was accordingly done, such property consisting of $8,000 in money and $78,515.17 of other assets. The claims against the bank at that time aggregated $68,706.06. February 3, 1895, after such reassignment, the bank resumed, and thereafter continued in business till the fall of 1895, when it suspended, being hopelessly insolvent. February 3, 1895, Probert, on behalf of the principal and sureties in the aforesaid bond, applied to the county board for an extension of the time of payment of the sum secured thereby till the 3d day of February, 1896, and such application was duly granted by a resolution of the county board duly adopted, in consideration of a renewal of the bond by the principal with the same sureties. The bond was renewed accordingly, the renewal bond being the one sued on in this case. The amount due on such bond is $14,354.57 with interest, amounting in all to $14,773.36, for which the plaintiff is entitled to judgment, with costs.

Judgment was entered accordingly, from which all of the defendants except the bank appealed on exceptions duly filed.

For the appellants there was a brief by *Lamoreux, Shea & Wright*, attorneys, and *Tomkins & Merrill* and *Spooner, Sanborn & Spooner*, of counsel, and a separate brief signed by *William F. Vilas*, of counsel, and oral argument by *A. L. Sanborn* and *Mr. Vilas*. They argued, *inter alia*, that the deposit of the county moneys in the bank did not change the title thereto, but they still belonged to the county, and the bank, and subsequently its assignee, held them as trustees for the county. *State v. McFetridge*, 84 Wis. 473. The lien of the county thereon was, under sec. 3245, R. S. 1878, prior to that of other creditors. The transaction in which the bond in suit was taken amounted to a loan of the moneys to the bank for a definite period, which the county board had no power to make. The powers of that board are limited. *Frederick v. Douglas Co.* 96 Wis. 411; *Board of Supervisors of Oconto Co. v. Hall*, 42 id. 59, 47 id. 208; *Butternut v. O'Malley*, 50 id. 329; *Butler v. Milwaukee*, 15 id. 497; *State v. Buttles' Ex'r*, 3 Ohio St. 309; *Nashville v. Sutherland & Co.* 92 Tenn. 335; *Thomas v. Richmond*, 12 Wall. 349. The loan was the only consideration of the bond, and that being *ultra vires* and void, the bond cannot be enforced. *Copper Miners' Co. v. Fox*, 16 Q. B. 229; *Mecorney v. Stanley*, 8 Cush. 85, 87; *Shadbourne v. Daly*, 76 Cal. 355, 359; *Bixler v. Ream*, 3 Pa. (P. & W.), 282; *Rix v. Adams*, 9 Vt. 233; *Jones v. Ashburnham*, 4 East, 445; *Nelson v. Serle*, 4 Mees. & W. 795; *Wade v. Simeon*, 15 L. J. C. P. (N. S.), 114.

L. H. Mead, district attorney, and *R. M. Bashford*, for the respondent.

MARSHALL, J. This appeal turns on the question of whether the bond sued on is a valid obligation, and that is subdivided into whether the county board had power, under the circum-

stances, to take the first bond, and whether there was sufficient consideration for it to bind the obligors. In considering the subject, if the antecedent propositions, taken as the groundwork for discussion and reasoning, are wrong, however logically and clearly the ultimate conclusion be reached, the fault existing at the start will necessarily be retained at the finish, and such result be of no value as an aid to a proper solution of the important legal question before us. If we could safely say the situation of the parties concerned in the transaction and the circumstances characterizing the final consummation of the agreement, of which the bond was an essential part, were as assumed by the distinguished counsel who very ably presented appellants' side of the case in this court, their conclusions would seem to be sound and based on quite familiar legal principles. But can we so say? There is the question that confronts us at the outset.

Appellants' counsel assume that when the first bond was taken there were $14,354.57 of public money, either in the Shell Lake Savings Bank or the hands of its assignee, which belonged to the county in its own right or as trustee for the state, and that the county board loaned that money to the bank for one year in consideration of the bond to secure its ultimate payment. "That was the sole consideration for the bond," say counsel; and they again say, "The pivotal question is, Do county boards possess lawful power under our laws to agree that moneys received by the county treasurer for taxes shall be loaned for use by a bank or other private person, for a year or such time as they shall please to grant?" When we view such assumed situation in the light of the undisputed facts of the case, as we understand them, the force of what we have already said, to the effect that right conclusions cannot be logically and safely reached unless we start with correct premises, is quite apparent.

At the time of the agreement to take the first bond, the county had a judgment against its treasurer and his bonds-

men, including $14,178.35 paid by the several town treasurers as their proportion of the state taxes for the year 1893, and not yet turned over to the state treasurer, and $1,241.61 of other county funds, all of which the county treasurer had lost through depositing the same in the Shell Lake Savings Bank. That judgment was *prima facie* uncollectible, all legal remedies to that end having been exhausted without realizing anything on it. The claim of the treasurer against the insolvent bank and its assignee, representing such moneys, had been transferred to the county and was county property, applicable when and as fast as collected, in discharge of the liability of the treasurer and his bondsmen on such judgment. There was no money in the hands of the assignee of the bank out of which to pay any considerable part of such claim. The county was a mere general creditor of the bank, having the right to participate in the distribution of the money realized out of its assets with other creditors, all representing debts of nearly $70,000. The amount realized by the assignee, after more than six months' handling of the matter, was but a little over ten per cent. of such indebtedness; hence the real value of the county claim against the bank was exceedingly uncertain. To summarize: The county owned a judgment against its treasurer and his bondsmen, each and all of whom were insolvent, and, as collateral thereto, a claim against an insolvent bank, no part of which was immediately collectible, and the ultimate value of which, and the time when such value would be realized by the county, was exceedingly uncertain. Under such circumstances, was it competent for the county board to release one of the bondsmen, the president of the insolvent bank, and consent to a reassignment to the bank, so it could resume business with some prospect of ultimately paying its indebtedness, suspend further proceedings to collect such judgment, and extend the time for the bank to pay the claim on condition of its giving a bond with sufficient sureties to

make reasonably certain the payment thereof at the end of the extension period? The county did not have $14,175.35, or any other sum of money, which its board undertook to loan to private parties, as counsel assume, so the observation that such board had no control over public money except to apply it according to law, though true, does not apply to the case before us. There was no such money to deal with. It had been lost through the deposit of it in an insolvent bank, and there was in its place a mere claim of doubtful value against such bank and an insolvent county treasurer and his insolvent bondsmen. How to recover the lost county funds was the problem that confronted the county board and which they dealt with in taking the bond. They did not resort to the bond as a means of lending money to private persons, but as a means of solving the problem stated, of recovering public money that had been lost. A discussion by counsel of the question whether the county board had, under such circumstances, power to take the bond, would have been appropriate and helpful, but candor compels us to say that we have not received much light on the subject from their briefs filed in the case.

True, if the county board possessed authority to take the bond, it must be found in an express statutory power, or some power necessarily incident to such an express power, and there ought to be no serious difficulty in pointing out its source in such an important matter. We will examine that question.

Sec. 650, R. S. 1878, provides that a county may sue and be sued, and make such contracts and do such acts as shall be deemed necessary and proper to the exercise of the powers and privileges granted to, and the duties charged upon, it. Sec. 652, R. S. 1878, provides that the powers granted to a county shall be exercised by its county board. So whatever powers are incident to the right to sue and be sued, and the power to make whatever contracts and do whatever acts shall

be deemed necessary and proper to the exercise of the powers and privileges, and the duties charged upon a county, are exercisable by its county board. It would seem to rest in sound reason and common sense, without judicial authority to support it, that the right to sue and be sued, in the conduct of corporate business, must necessarily carry with it the right to compromise and settle disputed or doubtful claims. Beach, in his work on Public Corporations (at §§ 638, 639), speaking on this subject, says, in substance: The law is well settled that public corporations have power to effect the compromise of claims in favor of or against them, and that such power is a necessary incident of the right to sue and be sued; that such power of compromise exists whether the corporation is a party plaintiff or defendant, and may be exercised at any time before the validity of the claim is fixed by final judgment, and afterwards in case of the insolvency of the debtor. To the same effect is Dillon, Mun. Corp. § 477, and numerous cases in courts of the highest respectability cited by both text writers. In *Agnew v. Brall*, 124 Ill. 312, the doctrine that the governing body of a corporation has no power to discharge a debt due to the corporation without payment, is expressly limited to cases where the debt is against parties who are solvent. The court said, in effect, that while it is a plain proposition that the municipal board must confine its operations to the powers conferred by law, and that it has no power to squander or give away corporate property, or discharge a debt against a solvent and responsible party, it may settle disputed or doubtful claims, and that follows as an incident to the right to maintain and defend actions.

The following from the opinion of ADAMS, C. J., in *Collins v. Welch*, 58 Iowa, 72, is along the same line as the foregoing, and appears to touch this case unfavorably to appellants at every point: "It is true that where a claim has been reduced to judgment, all questions pertaining to the rightful-

ness of the claim have been adjudicated; but questions may arise subsequent to the rendition of judgment, and where they are of such a character as to render a compromise expedient, it is manifest that the board ought to have the power to make it. Suppose, for instance, that the financial condition of the judgment debtor is such that the board is unable to discover any way of collecting any part of the judgment; the board should have the power to accept a part in satisfaction of the whole of its judgment, if thereby the best interests of the county would be promoted. The rules of business conduct, by which a prudent person is governed, are applicable to a county in the management of its affairs under similar circumstances." Certainly, if it be true that where a county has a claim against an insolvent public officer and his insolvent bondsmen, its governing board, charged with the duty of caring for its property and conducting its business affairs, in such cases is powerless to use the methods which ordinary prudence would dictate in the management of such business by a private person, then our system of county government is indeed most woefully weak in a material particular. We are unable to hold that such weakness exists. To our minds, the statutes referred to, and others hereafter cited, confer express power on the board to meet such situations. In *Butternut v. O'Malley*, 50 Wis. 329, confidently cited by counsel, a far different question was presented. The facts in that case were that a town board attempted to rebate a judgment affirmed by the court of last resort against persons whose solvency was not questioned. The court distinctly indicated in the opinion that the case was not governed by authorities to the effect that a corporation may compromise and settle disputed or doubtful claims.

Under sec. 984, R. S. 1878, it was the duty of the chairman of the county board to prosecute the claim against the treasurer and his bondsmen to judgment, and to see that all

legal remedies for its collection were exhausted. But beyond that the power to further proceed to collect the claim rested wholly with the county board if any power in that regard existed at all. No special provision of law exists lodging the duty anywhere else. Obviously, the county was not bound to lose its claim because the sheriff failed to collect the judgment on the executions. Now, sec. 669, subd. 6, comes in at this point and provides that the county board shall represent the county and have the care of the county property and the management of the business and concerns of the county in all cases *where no other provisions exist.* It follows necessarily that, after failure to collect the judgment on execution, the duty devolved on the board, under subd. 6 referred to, to represent the county and conduct its business in regard to such further efforts to collect the claim as in the judgment of the board were proper; and that under secs. 650, 652 the board was clothed with broad discretionary power to make such contracts and do such acts as in its wisdom were necessary and proper to the end that the county might finally recover the debt due to it.

So we reason easily up to the conclusion that the county board possessed express authority to take the bond of the Shell Lake Savings Bank, with appellants as sureties thereto, if done in good faith and deemed necessary by the board in the performance of its duties to collect the debt due from its treasurer and his bondsmen by realizing on the collateral claim against the bank. On the question of whether the board acted in good faith there can be no reasonable controversy, as that was in effect found by the court and was not excepted to. Not only good faith, but good business judgment, was exhibited by the board, if we are to test their conduct by the standard of ordinary prudence and business sagacity in the affairs of life.

But it is said there was no consideration for the bond; that the recitals show that the only consideration was a loan

of public funds to the bank,—an illegal proceeding rendering the whole transaction void. In the light of the circumstances under which the bond was taken, it is considered that its language will not admit of the interpretation given by appellants' counsel. The recitals show that there existed a debt due from the bank to the county; that the bank was insolvent; that its business was in process of settlement in assignment proceedings for the benefit of creditors; that the bond was given to secure consent of the county to a reassignment that the bank might resume business and ultimately pay its debts, and one year's time was given the bank for that purpose. True, the language of the bond is, "The money shall not be withdrawn from said bank until one year," but that, taken in connection with the recitals, shows merely a condition that the bank was to have one year's time to pay its debt. In our judgment such condition does not indicate, and should not be taken to mean, that the money belonging to the county was then in the bank or the hands of its assignee.

When we consider that the county was the owner of the claim against the bank as a mere collateral to the payment of the debt of its insolvent treasurer and his bondsmen, against whom all legal remedies had been exhausted, and that the bond was a means of securing the certain collection of such collateral claim, instead of a loan of money by the county to the bank, the arguments of counsel, made with such learning and ability on the latter theory, lose all their force. They do not touch the real situation, and we may safely say that upon the correct theory of such situation, that is, that the bond was given to secure the payment of a debt of doubtful collectibility upon the consideration that the debtor would be permitted to handle its property for the purpose of paying such debt instead of having that done by an assignee and should have one year without interest to make such payment, there can be no question as to the sufficiency

of the consideration to uphold the obligation, or as to the power of the county board to take it.

There is a further point made that several members of the county board were interested as creditors of the bank in having it resume business; that, counting out such interested members, a sufficient number did not participate in the proceedings and consent to the arrangement whereby the bond was taken, to make the action of the county board legal. Whether the appellants, on the facts, in any event could raise that question may well be doubted, but it is sufficient for this case to say that no defense on that ground was pleaded, or facts found by the trial court covering that situation, or exceptions taken to raise the question in this court.

The foregoing leaves nothing further that need be said. If the first bond was a valid obligation, and we hold that it was, the cancellation of it, and giving an additional term of one year to pay the debt of the bank, was ample consideration for the second bond, the one in suit.

By the Court.—The judgment of the circuit court is affirmed.

ELLIS, Appellant, vs. ALLEN and others, Respondents.

May 4—May 24, 1898.

(1) *Undertaking on appeal: Waiver of irregularity.* (2–5) *Foreclosure of mortgages: Fraud: Attorney and client: Appeal: Objection to jurisdiction: Costs.*

1. The consent of the respondent that an undertaking on appeal, which on exception by him has been held insufficient, may be signed by a new surety, and when so signed be deemed satisfactory, is a waiver of any irregularity in that mode of procedure.
2. A mortgagee's attorney, having obtained a judgment of foreclosure, had his own brother appointed referee to make the sale, and caused the land to be bid off in the name of his own sister, the

plaintiff in this action, and the mortgagee, as joint purchasers, by that means attempting to secure for himself a half interest in property worth $1,700 on account of his claim for services amounting to less than $200. The sister had no interest in the mortgage and paid no money on the sale, but she claimed that the attorney had assigned his claim to her in payment for housekeeping, and it appeared that before the sale the attorney had sold the same claim to a third party, who, after the foreclosure sale, purchased the property from the mortgagee. In an action by the sister for partition, *held*, that the transaction was fraudulent.

3. An attorney, on foreclosing a mortgage, even if entitled to a lien for his services, is not thereby entitled to bid off the property at the sale in the name of another to preserve such lien; nor, even though the mortgagee may have consented that it be bid off in their joint names, which would give them interests in proportion to the amount invested by them respectively, is he authorized to substitute his sister in place of himself, so that she could claim a half interest.
4. A plaintiff who has brought a suit in equity cannot, on appeal by her, raise the objection that the defendants' answer contests her title, and the action should have been at law.
5. In the taxation of costs, witness' fees supported by the usual affidavit of disbursements may properly be taxed, notwithstanding an affidavit by a stranger to the effect that he is informed and believes that no fees were paid to a certain witness named in the bill of costs, and that he was not subpœnaed.

APPEAL from a judgment of the circuit court for Barron county: A. J. VINJE, Circuit Judge. *Affirmed.*

On March 4, 1898, the respondent moved to dismiss the appeal.

James Wickham, for the motion.

C. F. Lamb, contra.

The following opinion was filed March 22, 1898:

PER CURIAM. After the undertaking in this case had been served, defendants duly excepted to the sufficiency of the sureties. Notice was given that the sureties would justify before a commissioner. Both parties appeared, and upon the examination it was found that one of the sureties was

insufficient. Thereupon plaintiff duly presented another surety, who was duly examined by defendants' counsel and found sufficient. He then signed the original undertaking, with the consent of all concerned, and defendants' counsel expressed himself as satisfied therewith. The undertaking so signed was sent up to this court. Defendants now move to dismiss the appeal on the ground that no proper undertaking has been served.

The motion must be denied. Consent that the new surety might sign the old undertaking is a waiver of any irregularity in the mode of procedure. Motion to dismiss the appeal is denied, with $10 costs.

The facts were as follows:

Prior to April, 1892, one Whigam was the owner of a mortgage on W. ½ of S. W. ¼, section 23, and E. ½ of S. E. ¼, section 22, township 32, range 11 W., executed to him by Ole P. Engen and wife, for the sum of $1,000. Whigam employed J. F. Ellis as his attorney to foreclose said mortgage; and on April 19, 1892, a judgment of foreclosure was entered for $1,271, principal and interest, and $160.12, solicitor's fees and costs. W. H. Ellis, a brother of J. F. Ellis, was named as referee in the judgment to make sale of the mortgaged premises; and on August 31, 1894, he made a sale of the same, and caused them to be bid off in the names of Whigam and *Elizabeth A. Ellis* for $1,729.83, the latter being a sister of J. F. and W. H. Ellis, and a deed to them jointly was made, and the sale duly confirmed. No money was paid at the time of the sale, and the amount for which the premises were sold was the amount due for principal, interest, and costs on the judgment at that time. Afterwards, and on May 23, 1895, the *Southwestern Land Company* purchased Whigam's interest in the property; but the purchase price was paid by the defendant *E. W. Allen*, and the title was taken in his name as security for the money advanced by

him for the company. Plaintiff then commenced this action for a partition of said lands, claiming to be the owner of an undivided one-half of said premises.

The defendants answered, denying that plaintiff had any interest in the land, and alleged that the claim for services of J. F. Ellis in said foreclosure case, and for expenses incurred therein, had been duly sold and assigned to the *Southwestern Land Company*, after the entry of judgment, and before the sale. By way of counterclaim, they set up the facts as before stated, and alleged that the taking of the title at the foreclosure sale as aforesaid was without the knowledge or consent of Whigam, and was so taken in fraud of his rights; that plaintiff paid no part of the consideration at such sale, and had no interest, in fact, in said lands. They asked to have the apparent interest of plaintiff adjudged void, and that the title to said lands be declared in the defendant *E. W. Allen.*

The case came on for trial before the court, and the findings of the court are substantially as stated and as claimed by the defendants, and judgment was entered accordingly. Plaintiff moved for a new trial upon affidavits, claiming that Whigam was a material witness, and that she had not been able to secure his deposition; that she could prove by him that the title to the lands at the foreclosure sale was taken jointly in the name of plaintiff and Whigam by his express consent. The court denied the motion. Objections were made by plaintiff to certain items of disbursement mentioned in the opinion. The plaintiff appeals from the judgment and order denying a motion for a new trial.

For the appellant there was a brief by *H. G. Ellsworth*, attorney, and *J. F. Ellis*, of counsel, and oral argument by *J. F. Ellis* and *F. J. Lamb.* To the point that, since both parties derived their title from the same foreclosure judgment, sale, deed, and order of confirmation, neither could question its validity, they cited *Tucker v. Whittlesey*, 74 Wis.

74, 83; *Warner v. Frow*, 36 id. 195, 200; *Newton v. Marshall*, 62 id. 8, 15; *Allen v. Elderkin*, id. 627, 629; *Board of Sup'rs of Iowa Co. v. M. P. R. Co.* 24 id. 93; *Deery v. McClintock*, 31 id. 195, 200; *Geisinger v. Beyl*, 44 id. 260; *Salisbury v. Chadbourne*, 45 id. 76; *Allie v. Schmitz*, 17 id. 173; *Wolf River L. Co. v. Brown*, 88 id. 646.

For the respondents there was a brief by *Wickham & Farr*, and oral argument by *James Wickham.*

The following opinion was filed May 24, 1898:

BARDEEN, J. We do not care to enter upon any very prolonged discussion of the facts involved in this case. The findings of the trial court are so manifestly correct, and so amply supported by the testimony, that no useful purpose would be answered thereby. The plaintiff claims to be the owner of an undivided one-half interest in the premises in question. Her pretended claim of ownership is based upon the fact that her brother, an attorney, performed services for Whigam in foreclosing a mortgage on the same. His claim for services and disbursements was something less than $200. At the foreclosure sale, the referee, another brother of the plaintiff and her agent, caused the property to be bid off in the names of plaintiff and Whigam, the mortgagee. The plaintiff paid no money at the time, and had no interest in the premises or in the mortgage. The plaintiff was not a witness at the trial, but it was attempted to support her claim to the land by showing that her brother J. F. Ellis owed her for housekeeping, and had transferred to her his claim for services in the foreclosure suit.

We cannot view this feature of the case with any sort of patience. The attempt to secure a one-half interest in a farm, which sold at foreclosure sale for over $1,700, upon a claim resting upon so flimsy a foundation as this, is well calculated to test even judicial patience. The bidding off of the land in the manner noted was a wholly unwarranted

proceeding. The attorney may have been entitled to a lien for his services, but such lien did not invest him with authority to bid off the land at the sale in his sister's name to preserve the same. But the court has found, as we think upon ample evidence, that after the judgment of foreclosure was entered, and before the sale, Ellis sold his claim for services to the defendant the *Southwestern Land Company.* This throws still greater suspicion on the transaction. It is claimed by the attorney that he wrote to Whigam that he would sell on the foreclosure, and send his bill for services, and Whigam could pay him for what he had done, or he would bid off the property at the sale in his and Whigam's names in case the latter did not want to pay him for his services. He says also that he received a letter in reply, but that it had been sent to New York, and was not produced. Admitting, as is contended, that the attorney had authority to bid off the land as suggested, it gave him no right to cause the title to be taken in the name of the stranger. As between Whigam and the attorney, upon the consummation of such a sale, their interests in the land would be in proportion to the amounts each had invested therein. But, as soon as the stranger appears in the transaction, we find her claiming a one-half interest. It seems quite impossible to reconcile this situation upon any basis of good faith. Upon every theory of correct dealing between attorney and client, it merits the condemnation of defeat.

It is further urged by plaintiff that, the legal title being in controversy, the court ought to have sent the parties to a court of law to settle their dispute, as was suggested in *Deery v. McClintock*, 31 Wis. 195, and other cases in this court. So far as we are aware, in all of the cases bearing upon this question the objection to the jurisdiction of the court was asserted by the defendant. But here we have a plaintiff planting herself in a court of equity, with an answer served that contests her title, and after the whole question

has been litigated and she has been defeated, asking this court to reverse that decision, because, forsooth, the court ought not to have entertained the case. We more than half suspect that her true reason now for that contention is because she was sent out of court on the merits. As soon as the answer containing the counterclaim assailing her title was served, she was advised of her peril. She might then have changed the scene of action, and sought other intrenchments. But, having elected to continue the fight, she has left to her only the melancholy recourse of the defeated,—that of burying her dead, and carting the wounded to the hospital under a flag of truce.

Plaintiff objects to an item of $11.90 witness' fees, taxed by defendants for one Schultz. The taxation is supported by the usual affidavit of disbursements. Opposed to this is an affidavit of W. H. Ellis, who says that "he is informed and believes" that said witness was paid nothing to attend the trial, and was not subpœnaed. The item was properly allowed. The same may be said of the item of $5.52 for telegraphing. The affidavits printed upon which the motion for a new trial was made fail to show any good reason why the case should have been reopened. Several other objections to the findings were raised, but they are so unsubstantial that we do not deem it necessary to review them at length.

By the Court.—The judgment of the circuit court is affirmed.

FIELD and others, Respondents, vs. SIEGEL and another, imp., Appellants.

99 605
108 465
99 605
347 LRA 488
57 LRA 754n
99 605
115 16

May 4—May 24, 1898.

Action for conspiracy to defraud creditor.

A general creditor of one who, when perfectly solvent, without fraud, purchased goods of him on sixty days credit, cannot maintain an action on the case against such debtor, and against other defendants with whom he subsequently conspired by confessing judgment on fictitious notes to place all his property beyond the reach of such creditor, to recover damages therefor.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The facts of the case appear in the opinion.

For the appellants the cause was submitted on the brief of *Hughes, Whitford & Gosnell.*

For the respondents there was a brief by *W. M. Steele* and *A. T. Rock*, and oral argument by *W. M. Steele.* They contended, *inter alia*, that the action could be maintained against the debtor and all who conspired with him to defraud the plaintiffs. *Place v. Minster*, 65 N. Y. 89, and cases cited; *Work Bros. & Co. v. McCoy*, 87 Iowa, 217; *Tucker v. Finch*, 66 Wis. 17; *Page v. Parker*, 43 N. H. 363. The purchase of the goods having been made with intent to defraud the plaintiffs, the purchaser had only a voidable title, and the plaintiffs had an interest in the goods. *Adams v. Paige*, 7 Pick. 542; *Findlay v. McAllister*, 113 U. S. 104. Even if the purchase was not fraudulent, the unlawful acts of defendants, done in a conspiracy, constitute a cause of action. *Penrod v. Morrison*, 2 Pa. (P. & W.), 126; *Mott v. Danforth*, 31 Am. Dec. 468; *Hurwitz v. Hurwitz*, 30 N. Y. Supp. 208, 9 Misc. 201; *Meredith v. Johns*, 1 Hen. & M. 585; *Smith v. Tonstall*, Carthew, 3, 4; *Kelsey v. Murphy*, 26 Pa. St. 78.

CASSODAY, C. J. This is an appeal from an order overruling a demurrer to the complaint, which is very lengthy, and alleges numerous facts with unnecessary detail, but is to the effect that between September 2, 1895, and November 20, 1895, the plaintiffs, as copartners and wholesale merchants at Chicago, sold and delivered to the defendants Cohen & Siegel, as partners, and at their request, goods, wares, and merchandise of the value of $1,155.98, on a credit of sixty days from the date of each invoice, for which they promised and agreed to pay to the plaintiffs the amount of each invoice as the same matured, amounting in all to the sum stated; that no part thereof has been paid, except $18 November 15, 1895; that the balance of $1,137.98 was still due and unpaid; that Cohen & Siegel during the summer and fall of 1895 in like manner purchased goods, wares, and merchandise of divers other wholesale and jobbing merchants in Chicago and elsewhere on credit, and became and were indebted therefor in December, 1895; that between August 1, 1895, and December 29, 1895, and while Cohen & Siegel were possessed of a stock of merchandise of the value of about $30,000, they, together with the other defendants, did wrongfully, maliciously, unlawfully, and fraudulently conspire, connive, and contrive together to defraud the creditors of Cohen & Siegel, including the plaintiffs, out of their just demands against Cohen & Siegel; that in pursuance of such conspiracy to defraud their creditors, and as a means to effect such fraud, Cohen & Siegel, conspiring with the other defendants, made and delivered a large number of notes to the other defendants, respectively, or firms, dated at different times, and payable at different dates, and at different rates of interest, in the aggregate of nearly $10,000, and upon which notes judgments were fraudulently taken by confession, and by the several defendants acting in concert, December 30 and 31, 1895, and which judgments so fraudulently confessed and entered, with accumulated costs,

amounted in the aggregate to the sum of $10,145.84; that immediately upon the rendition and entry of such judgments the defendants caused executions to be issued thereon, in due form of law, directed and delivered to the sheriff, and directed and instructed him to levy the same upon all the personal property and assets of Cohen & Siegel, and to take the same into his possession, and to sell the same to satisfy said executions; that in pursuance of such instructions the sheriff on December 30, 1895, levied upon, seized, and took into his possession all the property of Cohen & Siegel, consisting of their stock of merchandise, and, after duly advertising the same for sale under said executions, sold the same at public auction February 11, 1896, to the defendant Isaac Rothstein, for an amount insufficient to satisfy the amounts claimed to be due on said executions.

The complaint further alleges that at the time said stock of goods and merchandise was so levied upon and seized by the sheriff under said several executions, the same was well and reasonably worth, and of the reasonable value of, $25,000; that the same was all the property and assets the defendants Cohen & Siegel, or either of them, then owned, not exempt, and that they have not now, nor has either of them, any tangible assets or property out of which the plaintiffs can make satisfaction of their said claim against them, above specified; that Cohen & Siegel were not at any of said times indebted to any or either of said other defendants in any sum or sums whatever, but that all of said notes, complaints, answers, confessions of judgments, and judgments were and are false and fictitious, and that all of the acts of said defendants done in the premises (the purchasing from the plaintiffs of the several invoices of goods mentioned, and contracting the indebtedness due to the plaintiffs from Cohen & Siegel aforesaid; the making of the notes, complaints, answers, and confessions of judgments; the issuing of executions thereon; the sale of the goods and chattels of Cohen &

Siegel thereunder; and the purchase thereof by Rothstein) were all so made, done, or caused to be done, as part of one common plan, design, and conspiracy on the part of, and participated in by, all of the defendants, to effectuate and accomplish by means thereof a fraudulent conveyance and transfer of all the property and assets of Cohen & Siegel to the defendant Rothstein, with the intent and for the purpose to place the same beyond the reach of their *bona fide* creditors, and with the intent and purpose to cheat and defraud the plaintiffs and other creditors out of their just demands against Cohen & Siegel, and prevent the plaintiffs from resorting to the property and assets to enforce payment of their said claim; that, prior to the sale of the goods and chattels aforesaid under the executions aforesaid, Cohen & Siegel had and possessed ample property and means to have paid all their *bona fide* indebtedness in full, and at all of said times were financially responsible and solvent.

The complaint prayed judgment against the defendants, and each of them, for $1,137.98, with interest from January 20, 1896, and costs and disbursements of this action.

The demurrer admits to be true the several allegations of fact contained in the complaint. If they are true, they are certainly disreputable to the several defendants, and such as to entitle the plaintiffs to a remedy in an appropriate proceeding against them. The only question we are here called upon to determine is whether, upon the facts alleged, they are entitled to recover in this action. The complaint is replete with allegations of fraud, conspiracy, and concert of action by and between, and on the part of, the defendants; but none of them relates to any overt act in contracting the debt or procuring the goods. Nevertheless, the complaint alleges, in effect, that during the time between August 1, 1895, and December 29, 1895, Cohen & Siegel, as copartners, were possessed of a stock of merchandise of the value of about $30,000; that when their stock of goods was levied

upon and seized upon such executions, December 30, 1895, the same was of the value of $25,000; that prior to the sale of such goods and chattels under the executions aforesaid, February 11, 1896, Cohen & Siegel "had and possessed ample property and means to have paid all their *bona fide* indebtedness in full, and at all said times were financially responsible and solvent." Their indebtedness to the plaintiffs was contracted between September 2, 1895, and November 20, 1895; and so it appears that Cohen & Siegel were perfectly solvent for more than a month prior to the time when any portion of the plaintiffs' debt was contracted, and remained perfectly solvent for nearly three months after the last item of that indebtedness was contracted. It is not, therefore, the case of an insolvent debtor purchasing goods on credit,—much less, an insolvent debtor, knowing himself to be insolvent, so purchasing goods with the preconceived purpose of not paying for them. *Lee v. Simmons*, 65 Wis. 526.

There is no allegation that the plaintiffs were induced to sell or part with the goods, or any of them, to Cohen & Siegel, on credit, by reason of any fraud, false statement, representation, or pretense whatever. Even when a vendor parts with his goods upon false representations, yet it is well settled that such representations are not actionable unless they were not only relied upon by the vendor, but related to some present or past state of facts; that the mere failure to perform a promise, or to make good subsequent conditions which had been assured, is insufficient to maintain an action for deceit. *Morrison v. Koch*, 32 Wis. 254; *Patterson v. Wright*, 64 Wis. 289; *Sheldon v. Davidson*, 85 Wis. 141; *Warner v. Benjamin*, 89 Wis. 296; *Louis F. Fromer & Co. v. Stanley*, 95 Wis. 56. Whatever may have been the secret and ultimate purpose of the defendants, or any of them, yet the first action alleged to have taken place in regard to the transfer of Cohen & Siegel's stock of goods in fraud of the plaintiffs and their other creditors was on December 30,

1895, when the judgments were fraudulently confessed and the property seized on executions. That was forty-one days after the last sale of goods from the plaintiffs to Cohen & Siegel. It is the case, therefore, of a firm of merchants, perfectly solvent, purchasing goods on short credit, without any fraud or false statement, representation, or pretense, and then, subsequently, and after the purchase, conspiring with the other defendants to dispose of their property in the manner indicated, with the intent on the part of all such conspirators to defraud the plaintiffs and other creditors of such solvent firm.

The question recurs whether an action on the case can be maintained for such an alleged conspiracy. The adjudications are not all in harmony. The Massachusetts cases are to the effect that no such action can be maintained. Thus, it was held many years ago that "an action on the case for the fraud of the defendant in purchasing personal property of the plaintiff's debtor, and aiding the debtor to abscond in order to prevent the plaintiff from enforcing payment of his debt by attaching the property or arresting the body of the debtor, cannot be sustained; but the proper remedy is either to attach specifically the property fraudulently transferred, or to attach it in the defendant's hands, by the trustee process." *Lamb v. Stone*, 11 Pick. 527. To the same effect, *Wellington v. Small*, 3 Cush. 145; *Bradley v. Fuller*, 118 Mass. 239; *Dudley v. Briggs*, 141 Mass. 582; *Dawe v. Morris*, 149 Mass. 188. See, also, *Greene v. Kimble*, 6 Blackf. 552; *Moody v. Burton*, 27 Me. 427–435. In this last case, as well as some of the others cited, the learned judge writing the opinion clearly shows that "the loss or injury would be too uncertain and remote for legal estimation."

So, it was held in Connecticut that: "An action for fraudulent acts, intended to induce, and by which a creditor was induced, not to secure a debt by legal process, by which means he lost the debt, will not lie at common law; and

it makes no difference if a conspiracy for the purpose is charged. The damages are too remote. They must be a clear and necessary consequence of the fraudulent act, and of a character to be clearly defined and ascertained." That was an action of trespass on the case at common law, and was brought against a debtor and two other defendants, charging a conspiracy to defraud the plaintiff of his debt, and alleging that the defendants fraudulently removed the debtor's goods to prevent their being taken by legal process; but it was held that the plaintiff could not recover. *Austin v. Barrows*, 41 Conn. 287. So, it has been held in Rhode Island that: "A., being a creditor of B., brought trespass on the case against C. and others, charging them with conspiring to prevent A. from obtaining payment out of the estate of B., and with receiving from B. fictitious mortgages, by means of which they took B.'s personalty, and secreted it, so that A. could not attach it, and thus lost his claim. It appearing that A. had no lien on B.'s estate by attachment, levy, or otherwise, and was only a creditor at large of B., *held*, that the action could not be maintained." *Klous v. Hennessey*, 13 R. I. 332. So, it has been held in Maryland that: "In an action on the case against several, founded on an alleged conspiracy to injure the plaintiffs, they are not entitled to recover, even if there were such unlawful conspiracy among the defendants, unless the plaintiffs can show that they have in fact been aggrieved, or have sustained actual legal damage, by some overt act done in pursuance and execution of the conspiracy. No action lies for simply conspiring to do an unlawful act. It is the doing the act itself, and the resulting actual damage to the plaintiff, which furnish the ground of the action. An act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The quality of the act, and the nature of the injury

inflicted by it, must determine the question whether the action will lie." *Kimball v. Harman*, 34 Md. 407. So, it has been held in Vermont that: "An action on the case for the fraud of the defendant in combining with plaintiff's debtor in attaching all the personal property of the debtor, for the benefit of the debtor, and concealing the same, in order to prevent the plaintiff from enforcing the payment of his debt, cannot be sustained; but the proper remedy is either to attach the property fraudulently held, or charge the defendant as trustee, or seek aid in a court of equity, or pursue the defendant personally, under the statute, for being a party to a fraudulent judgment or fraudulent sale. Nor can an action on the case, where the gist of the action is the fraudulent combination and conspiracy of the defendant with the plaintiff's debtor to secrete the property, and prevent the plaintiff from obtaining payment and security for his debt, be sustained." *Hall v. Eaton*, 25 Vt. 458.

In some of the cases relied upon by counsel for the plaintiffs in support of this action, the fraud and conspiracy were practiced directly upon the plaintiff, and operated to destroy or impair his rights of property. *Page v. Parker*, 43 N. H. 363; *Findlay v. McAllister*, 113 U. S. 104; *Place v. Minster*, 65 N. Y. 89. This is not such a case. It has been held in New York that where the fraud or conspiracy is not actual and positive, but merely constructive, and where it did not concur in direct injury to the plaintiff, the action could not be maintained. *Ross v. Wood*, 70 N. Y. 8; *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508. The rule is elementary that an action on the case in favor of a general creditor will not lie against the fraudulent vendee or grantee of his debtor. Bump, Fraud. Conv. (4th ed.), § 528. In 6 Am. & Eng. Ency. of Law (2d ed.), 878, 879, it is said, as the better reason, in effect, that a general creditor has no such present or vested interest in the goods of his debtor as will render liable to such creditor, in an action on the

case for damages, those who enter into a conspiracy to remove or conceal such property so that it cannot be reached by legal process; and this is put upon the ground that such a loss and injury are too uncertain and remote for legal consideration. This view meets with our judgment.

It follows that the complaint does not state a cause of action.

By the Court.— The order of the superior court of Douglas county is reversed, and the cause is remanded with direction to sustain the demurrer, and for further proceedings according to law.

HUNTER and another, Appellants, vs. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.

May 4 — May 24, 1898.

Highway: Railroad company, liability as to cattle guards: Appeal.

1. In order to recover for the loss of an animal killed by falling through a trestle bridge on a railroad track, alleged to have been caused by the failure of the railroad company to erect and maintain cattle guards at a highway crossing, as required by sec. 1810, S. & B. Ann. Stats., the plaintiff must prove that a legal highway existed at the point in question across the company's right of way. Evidence showing that an order was once made by the town authorities purporting to lay out such a highway, but that no notice of the pendency of their proceedings was ever given to the company; that no damages were ever offered or paid; and that there was no release of damages, does not establish such a highway.
2. Defects in laying out a highway across the right of way of a railroad company are not cured, under the provisions of sec. 1295, R. S. 1878, by the opening and working of such highway, if within the three years specified in such section the railroad company fences across the same and puts in gates.
3. Where an action against a railroad company for the loss of an animal on its track, alleged to have been caused by its failure to maintain cattle guards at a highway crossing, was tried wholly upon the issue of highway or no highway, the plaintiff cannot, for the first time on appeal, claim to recover on the ground that the defendant failed to fence its track at that point.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action to recover the value of a horse alleged to have been killed by the neglect of the defendant to place cattle guards at a highway crossing. The complaint alleged that there was a highway known as "Eighteenth Street," on the south line of the city of Superior, which ran east and west, and crossed the track and right of way of the defendant substantially at right angles; that the defendant had failed to place cattle guards, as required by law, at the crossing, and that a horse owned by the plaintiffs wandered onto the defendant's track on the 14th of July, 1896, by reason of the absence of cattle guards, and was killed; that notice of the claim for the killing of such horse, as required by ch. 202, Laws of 1893, was served on the company, July 16, 1896. The answer consisted of a general denial.

The evidence upon trial showed that the horse in question belonged to the firm of W. Hunter & Co., and that such firm, at the time of the killing of the horse, was composed of *W. Hunter*, T. P. Hunter, and *S. S. Taylor;* that in the year 1890 a highway was attempted to be laid out by the joint action of the authorities of the city of Superior and the town of Superior upon the south line of the city, which was designed to be a continuation of Eighteenth street; that such highway crossed the track of the defendant company at right angles, the right of way not being fenced (the record of the condemnation proceedings was introduced in evidence, and showed no service of any notice of the proceedings upon the defendant, and no award of damages to the defendant, nor release of damages); that the supposed highway was partially worked and graded by the city authorities up to the railroad track upon both sides, and that the railroad authorities caused planks to be put between the rails of the railroad track at the crossing; that, in the year 1892, the railroad company fenced its right of way, and put sliding gates upon each side of its right of way at this crossing, which gates

have since been maintained, and were in place at the time of the accident, being opened and closed by people who used the highway; that on the 14th of July, 1896, an employee of the firm of W. Hunter & Co. took the horse, and went out into the country upon this highway, across the railroad tracks, through the gates, and went about a mile and a half further east, where he tied the horse to a tree and went to picking blackberries, the country being open and unfenced; that he returned in about an hour and a half, and found the halter broken and the horse gone; that, returning to the crossing, he found the gate partially open, and it appeared by the hoof tracks that the horse had entered upon the right of way, and wandered along northward upon the right of way about eighty rods, to a trestle work across a ravine, which it attempted to cross, and fell down into the ravine and was killed, but was not struck by any train. The proofs show that proper notice was given, as required by ch. 202, Laws of 1893, signed by *W. Hunter* and *S. S. Taylor*. There was evidence that the value of the horse was $95 or $100.

A verdict for the defendant was directed by the court, and from judgment thereon the plaintiffs appeal.

D. E. Roberts, for the appellants.

For the respondent there was a brief by *Pope & Perrin*, and oral argument by *Carl C. Pope*.

WINSLOW, J. Sec. 1810, S. & B. Ann. Stats., requires every railroad company to construct and maintain cattle guards at all highway crossings, and this action was based upon an alleged failure to fulfill that duty. The notice served upon the company previous to the commencement of the action specifies that the absence of a cattle guard at the public highway crossing was the cause of the death of the animal, and the complaint reiterates this statement as the sole ground of liability. No amendment charging any different ground of negligence was made upon the trial nor offered to be made, and thus the case comes to this court.

Upon this proposition it is quite certain that the plaintiffs failed to make a case, because they failed to prove the existence of a highway. It is true that they proved that an order was made by the city and town authorities purporting to lay out a highway at the place in question in 1890, but the proceedings offered in evidence showed affirmatively that no notice of their pendency was ever given to the railway company, and that no damages were ever awarded or paid, and there was no release of damages. Under these circumstances, it cannot be claimed that the supposed highway was ever legally laid out across the defendant's right of way. Nor can it be claimed that the defects were cured so far as that part of the street across the defendant's right of way is concerned by the provisions of sec. 1295, R. S. 1878, which cures defects in the proceedings after a highway has been opened and worked for a term of three years, so far as it has been so opened and worked; because the proof shows affirmatively that within two years the defendant fenced across the supposed highway, and put in gates, which act was clearly a denial of the existence of a highway and stopped the running of the statute. So it cannot be claimed that a highway existed either by force of the condemnation proceedings, or by voluntary dedication, or by the limitation statute just referred to, and it is not perceived how a highway could be created across the defendant's already existing right of way in any other way.

But it is said that, if there was no highway, then the right of way should have been fenced at the point in question, and that a recovery may be had by the plaintiffs by reason of failure to fence, under the provisions of sec. 1810, before cited. With regard to this claim, it is sufficient to say that it certainly cannot be made for the first time in this court. No such ground of liability was claimed, and no issue thereon joined or tried, in the trial court. The whole trial was upon the issue of highway or no highway, and the action cannot,

after reaching this court, be changed into an action to try the question of defective fencing.

Other questions were argued, but, as we regard the question which we have discussed as decisive, it is not necessary to notice them.

By the Court.—Judgment affirmed.

---

99 617
100 144

RAY, Respondent, vs. THE LAKE SUPERIOR TERMINAL & TRANSFER RAILWAY COMPANY, Appellant.

May 5 — May 24, 1898.

Jury drawn under existing law: Change of law, effect of: Appeal: Separate verdicts as to past and future damages.

1. Jurors, drawn and obtained for a term of court according to the law existing when so drawn and obtained, remain jurors for such term unless excused or discharged by the court, regardless of any change in the law for obtaining jurors made subsequent to such drawing and before the commencement of such term.
2. Where there is some evidence tending to support the findings of the jury, the decision of the trial court refusing to set aside the verdict as contrary to the evidence cannot be disturbed on appeal.
3. The fact that, in a verdict for damages for personal injuries, future loss is found separate from past loss, does not constitute error.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action to recover compensation for personal injuries alleged to have been caused by negligence of defendant. The complaint contains allegations to the effect that, while plaintiff was in the employ of the defendant as a flagman and switchman, at the intersection of a public street and defendant's road, called "Belknap Crossing," his duties including that of coupling cars when he deemed that necessary to aid

in keeping the crossing clear, and while he was in the performance of such duty of coupling cars, defendant's engineer suddenly and negligently backed up the car plaintiff was about to couple to another car, whereby his hand, without fault on his part, was caught between the bumpers and severely injured.

At the commencement of the trial, defendant, by its counsel, challenged the array of jurors upon the ground that they were drawn by the clerk of the court from the list of names furnished by members of the county board, and that the law authorizing that was repealed three days after such drawing, so that the manner of obtaining jurors at the time of the commencement of the term and of the trial of this action, was regulated by ch. 380, Laws of 1897. Such motion was overruled, to which due exception was taken.

The injury was not disputed on the evidence, but it was claimed that there was no evidence to show negligence on the part of the engineer in backing the car, and further, that plaintiff's duties did not require him to couple cars, and that his act in that regard was purely voluntary. The court submitted both questions to the jury, and they found in plaintiff's favor and assessed his damages at $750. There was a motion to set the verdict aside as contrary to the evidence, and because it was excessive, and for errors in giving and refusing instructions. The motion was denied and due exception taken. Judgment was entered in plaintiff's favor and defendant appealed.

For the appellant there was a brief by *Pope & Perrin*, and oral argument by *Carl C. Pope*. To the point that the drawing of the jurors in this case on August 21, 1897, under the law then existing, was annulled by the repeal of that law on August 24, 1897, and the defendant's challenge to the panel and to the array should have been sustained, they cited *State ex rel. Voight v. Hœflinger*, 33 Wis. 594.

Alexander Athey, for the respondent.

MARSHALL, J. The determination of the trial court overruling the challenge to the array of jurors cannot be disturbed. When jurors have been drawn and designated according to law to serve at a term of court, a mere change in the method of obtaining jurors, thereafter made, will not affect those already drawn, but they will continue, notwithstanding such change in the law, legal jurors for the term unless excused or discharged by the court.

Several errors are assigned, all involving the subject of whether there was evidence to sustain the verdict on two points: (1) Was coupling cars within the scope of plaintiff's employment so as to bring the case within the coemployee act (ch. 220, Laws of 1893)? And (2) was actionable negligence shown on the part of the engineer in the manner he caused the cars to move back as plaintiff was about to make the coupling? It is considered that there was some evidence, which the jury had a right to believe if they saw fit, tending to prove the affirmative of both such questions. Therefore, according to a familiar principle, the decision of the trial court, refusing to set aside the verdict and grant a new trial as contrary to the evidence, cannot be disturbed.

It is further assigned as error that the damages are excessive, particular mention being made of the fact that the jury divided the recovery into two elements by assessing $500 of the $750 for future loss. No reason is perceived why that should be held to affect the verdict. Future loss was an element distinct from all others, and one for which plaintiff had a right to recover if he had a right to recover at all. Certainly, the fact that the amount assessed for that element was stated separately could not in any way have prejudiced the defendant. On the contrary, it was a valuable aid in determining whether the whole verdict was excessive. According to the evidence plaintiff's hand was quite severely injured. He was not able to remove the bandages for three weeks, he suffered considerable pain, and the cure left his

hand somewhat maimed and out of shape, one of the fingers being stiff so as to interfere with the usefulness of the hand. We cannot say that a verdict of $750 for such an injury, to a man fifty-five years of age, is so large as to evince passion and prejudice on the part of the jury, therefore the verdict cannot be disturbed as excessive.

By the Court.—The judgment of the superior court is affirmed.

McFarlane, Receiver, Respondent, vs. Louden and another, imp., Appellants.

May 5—May 24, 1893

Appeal: Evidence: Presumption as to date of deed: Fraudulent conveyance.

1. In order to justify the supreme court in setting aside the findings of the trial court upon questions of fact, the evidence must clearly show that they are wrong.
2. A deed duly executed will be presumed to have been executed on the day it bears date, and the fact that it had no certificate of the official character of the notary who took the acknowledgment in another state, until after the land conveyed had been attached by creditors of the grantor, is not sufficient to overcome that presumption, or the finding of the court that it was so executed.
3. In the absence of fraudulent intent, a deed absolute in form, given as security for a *bona fide* debt previously incurred, is not fraudulent; and the mere fact that such deed was not recorded until after the land had been attached as the property of the grantor, is not sufficient to show it to be fraudulent as to creditors.

Appeal from a judgment of the circuit court for Douglas county: A. J. Vinje, Circuit Judge. *Affirmed.*

On July 21, 1892, the defendant Maud McKenzie was indebted to the Security Bank of Duluth in the sum of $4,894.85, and on that day she executed and delivered to one Paine, manager of the bank, a deed of the S. E. ¼ of

the S. W. ¼, section 12, township 48, range 15, as security for said sum, and for any indebtedness she might incur thereafter. This deed was recorded December 6, 1895. Paine deeded to the bank December 13, 1895. The notes evidencing this indebtedness were renewed from time to time, and payments made thereon, until February 5, 1896. At that date a settlement was made, and the balance unpaid was found to be about $4,093. As additional security, Mrs. McKenzie executed and delivered to the bank a deed of another forty of land, described as the S. W. ¼ of the S. W. ¼, section 12, township 48, range 15, the consideration mentioned being one dollar, etc. This deed was recorded May 26, 1896. On April 23, 1896, the defendant *Louden* commenced an action against Mrs. McKenzie, and levied an attachment on this last-mentioned forty. Judgment was entered June 25, 1896, for $357.37. On the same date, the defendant *Kline* also commenced a suit, attached the same land, and secured judgment June 25, 1896, for $743.70. The bank became insolvent, and the receiver appointed commenced this action. The complaint sets out the execution and delivery of the deeds mentioned, claiming that they were mortgages, and seeks to foreclose the same as such. The defendants *Louden* and *Kline* answered, claiming that the last-mentioned deed was executed after their attachments, and was given for the purpose of hindering, delaying, and defrauding Mrs. McKenzie's creditors. The case was tried by the court, and findings were made on all the issues in favor of the plaintiff. Judgment of foreclosure was entered for plaintiff, from which the defendants *Louden* and *Kline* appeal.

For the appellants the cause was submitted on the brief of *Reed & Reed.* They argued, among other things, that an equitable mortgage given for a precedent debt has no equity superior to that of a subsequent valid judgment. Pingree, Mortgages, § 652; *Wheeler v. Kirtland*, 24 N. J. Eq. 552. The

fact that the deed in this case was absolute in form, and its real character was concealed from creditors, shows that it was fraudulent. *Ross v. Duggan*, 5 Colo. 100; *Stevens v. Hinckley*, 43 Me. 440; *Moore v. Roe*, 35 N. J. Eq. 90; *Fuller v. Griffith*, 91 Iowa, 632; Wait, Fraudulent Conveyances, §§ 238, 404; *Barker v. French*, 18 Vt. 460; *Metropolitan Bank v. Godfrey*, 23 Ill. 604; *Thompson v. Pennell*, 67 Me. 162; *Sims v. Gaines*, 64 Ala. 392; *Ladd v. Wiggin*, 35 N. H. 426; *Chenery v. Palmer*, 6 Cal. 122. The fact that the deed was withheld from record for a long time is evidence of fraudulent intent. Wait, Fraudulent Conveyances, §§ 235–237.

For the respondent there was a brief by *Titus & McIntosh*, and oral argument by *T. L. McIntosh*.

BARDEEN, J. Unless we can say that the findings of fact of the circuit court should be disturbed, its conclusions of law must be sustained. It is insisted by the defendants that the court should have found that the deed of February 5 was executed subsequent to the date of their attachments. This contention is based upon the most vague and unsatisfactory inferences. In order to warrant this court in setting aside the findings of the court below on questions of fact, the evidence should be such, at least, as to enable us to see with some degree of clearness that the finding is wrong. *Magee v. Miss. River Logging Co.* 95 Wis. 377; *Catura v. Kleiner*, 95 Wis. 378; *Pomeroy v. Heddles*, 95 Wis. 455. The only facts of any weight relied upon to upset the finding in question are that the deed, having been executed in Minnesota, had no certificate of the official character of the notary upon it, until after the date of the attachments, and that Mr. Paine, the officer of the bank who drew the deed, did not remember positively just when the deed was executed. He said he supposed it was drawn upon the date which appears upon it. The presumption is that the instrument was

made on the day it bears date. Jones, Ev. § 45; 19 Am. & Eng. Ency. of Law, 50. See *Pringle v. Dunn*, 37 Wis. 449.

The fact that the certificate of the clerk to the deed is of subsequent date to that of the deed itself is perfectly consistent with good faith. That it was of subsequent date to the attachment, at most, gives rise to a mere surmise, of little weight in overcoming the presumption stated and the express finding of the court.

It is further urged that the undisputed facts found show fraud. It will be noted that there is no claim but that Mrs. McKenzie was justly indebted to the bank; nor is it stated that there is any evidence of fraudulent intent on the part of either, except such as is inferable from the transaction itself. The court expressly finds that no such intent existed. The fact that the deed was withheld from record from February to May is of no special significance, as the debts which the defendants are seeking to enforce were contracted long prior to the execution of the deed. There was no agreement to keep it from the records, so as to give the debtor a false credit; and the fact that it was not recorded until after the attachments, under the circumstances in proof, becomes unimportant. For the purpose of this case, it may be admitted that where one takes, as security for a previous debt, a deed absolute in form, and conceals the true nature of the conveyance, claiming title thereunder, the deed will be treated as fraudulent as against a judgment creditor of the grantor. But there is no evidence here that the bank was claiming the title to this land except as security. *Mr. Louden* was informed that, if he would pay what Mrs. McKenzie owed, he could have a deed of all the property the bank held. There is no proof that the debtor was insolvent, and it affirmatively appears that she had other property at the time the deed was executed. It is settled doctrine with most courts, as well as in this state, that a deed absolute on its face may be shown to be a mortgage. *Hoile v. Bailey*, 58 Wis. 434; *Phe-*

lan v. Fitzpatrick, 84 Wis. 240. And while such a conveyance may be a badge of fraud, it will be upheld where no fraud is intended. Such a conveyance has never been held fraudulent, in this state, *per se*, so far as we are aware, and, when it is shown that the transaction is *bona fide*, we see no reason why it may not be sustained. The question of good faith having been litigated and affirmatively established in this case by the findings of the court, we cannot disturb such conclusion upon any such vague and unsatisfactory inferences as are here urged for our consideration.

The objection to the finding as to the payment of taxes must also be overruled. There is some evidence to support it, although perhaps not the best. After Mr. Paine had given some testimony about the payment of taxes, defendants' counsel moved to strike out all evidence as to the payment of taxes on the ground that it was not the best evidence. The record fails to show any ruling of the court or any exception. The witness afterwards testified that he had paid over $130 as taxes, and the court allowed the claim at this amount. It would, of course, have been more satisfactory if the tax receipt had been produced and offered in evidence. The case of *Fuller v. Griffith*, 91 Iowa, 632, is cited as decisive against the plaintiff. An examination of the facts in that case discloses, as the court found, that, up to the very last moment, both the grantor and grantee in the deed claimed that it was an absolute conveyance, and not given as security.

By the Court.—The judgment of the circuit court is affirmed.

RICHARDS, Respondent, vs. LAND & RIVER IMPROVEMENT COMPANY, imp., Appellant.

May 5 — May 24, 1898.

Appeal, what reviewed: Foreclosure and judgment for deficiency.

1. A defendant, who was personally served with the summons and complaint in an action to foreclose a mortgage, but did not appear therein nor raise the objection that the complaint did not state facts sufficient to constitute a cause of action against him for personal liability for any deficiency, cannot raise that objection on appeal from a judgment for deficiency rendered against him by default, and from an order denying a motion to set aside such judgment, especially where the complaint is sufficient to inform such defendant that the plaintiff claims that he is liable and that judgment for deficiency will be taken against him.
2. Neither can that objection be raised on appeal from a judgment for deficiency and an order denying his motion, made at a subsequent term, to set the same aside, by a defendant who was, by the original judgment of foreclosure, declared to be personally liable for any deficiency, where such original judgment has not been appealed from, he being bound thereby.

APPEAL from a judgment and order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The facts of the case are stated in the opinion.

For the appellant there was a brief by *Lyman T. Powell*, attorney, and *Spooner, Sanborn & Spooner*, of counsel, and oral argument by *A. L. Sanborn.*

For the respondent the cause was submitted on the brief of *Dickenson, Kennedy & Graham.*

CASSODAY, C. J. It appears from the record that January 6, 1893, the defendant Abraham Levine, for value received, made his promissory note, payable to the order of the defendant *Land & River Improvement Company* January 6, 1896, for $1,500, with interest thereon at eight per cent. per annum, payable semi-annually, as a part of the purchase price

of the land therein described; that at the same time, and to secure the payment of such note, Abraham Levine executed and delivered to the company his mortgage on the same land; that said mortgage was duly witnessed and acknowledged, and was recorded January 14, 1893; that before the note became due, and February 13, 1893, the defendant *Land & River Improvement Company* did, by its indorsement in writing on the back of said note, for value received, assign, transfer, and deliver its interest in said note, and all rights under the mortgage, to the plaintiff, with its indorsements thereon, together with a written assignment of the mortgage, duly executed, witnessed, and acknowledged, and the same was recorded June 29, 1893; that the defendant Abraham Levine failed to comply with the terms of the note and the conditions of the mortgage, by failing to pay the principal sum mentioned, which became due and payable January 6, 1896, and certain portions of the interest, and otherwise, and of which failure to pay the *Land & River Improvement Company* had due notice.

On February 24, 1896, the plaintiff commenced this action to foreclose such note and mortgage. The complaint therein alleged the facts stated, and other facts more in detail, and that the plaintiff was the lawful owner and holder of the note and mortgage, and the amount due thereon, and prayed the usual judgment of foreclosure and sale, and that the sheriff be required to make report of sale according to law; and prayed that the judgment should order that if the moneys arising from such sale should not be sufficient to satisfy the judgment, costs and disbursements, and expenses aforesaid, judgment be rendered, upon the filing and confirmation of the report of sale, specifying the amount of such deficiency, against the defendants, Abraham Levine and *Land & River Improvement Company*, who were personally liable for the debt secured by the mortgage for the amount of such deficiency, with interest thereon from the

date of the last-mentioned report; and that the plaintiff have execution therefor, and such other or further judgment, order, or relief as is provided by law in such cases, and as may be just and equitable. Such complaint and the summons in the action were personally served on the defendant the *Land & River Improvement Company* February 24, 1896. The company did not appear in the action, but made default.

Judgment of foreclosure and sale was entered in the action June 1, 1896, reciting, among other things, that a referee had been appointed therein to compute and ascertain the amount due to the plaintiff upon the note and mortgage, also which of the defendants were personally liable for the amounts secured thereby; that the referee had reported, among other things, that there was due to the plaintiff on the note and mortgage $1,630.80, and $75 solicitor's fees, and that the defendant *Land & River Improvement Company* was personally liable, as indorser, for said sum of money secured by the note and mortgage. The court adjudged that all the allegations of the complaint were true, and that the report of the referee be confirmed, and found that there was due to the plaintiff the amounts stated. It was further adjudged that the defendant Abraham Levine and the defendant *Land & River Improvement Company* were, and each of them was, personally liable for the indebtedness aforesaid; that, if the proceeds of such sale be insufficient to pay the amount aforesaid, the sheriff should specify the amount of such deficiency in his report of sale; and judgment for such deficiency was thereby ordered to be separately rendered against the defendants, Abraham Levine and *Land & River Improvement Company*, who were personally liable therefor, as therein adjudged, on or before the coming in and confirmation of the report of sale, to be docketed and enforced as in other cases. The sheriff made such sale, and filed his report thereof July 20, 1897. On July 27, 1897, it

was ordered by the court that said sale be, and the same was thereby, in all things confirmed. And it further appearing to the court, by the sheriff's report, that after applying the proceeds of the sale to the amount adjudged to be due for principal, interest, and costs, and payment of the sums in and by the judgment and decree ordered and directed to be paid, there remained a deficiency in the amount necessary to pay the sum adjudged to be paid by the judgment and decree, to the amount of $772.77, and it being adjudged by the court, in the judgment and decree entered therein, that the defendant *Land & River Improvement Company* is personally liable, and that the plaintiff have judgment against the *Land & River Improvement Company* for any such deficiency, it was therein ordered and adjudged that the plaintiff have and recover of the defendant *Land & River Improvement Company* the sum of $772.77, and that judgment be entered accordingly, and that the said plaintiff have execution therefor.

On November 9, 1897, the defendant *Land & River Improvement Company* moved the court, upon the records and files in this suit, and upon all the papers made, served, and filed therein, and upon all proceedings therein taken, for an order vacating and setting aside the judgment rendered and entered in this suit July 27, 1897, against the defendant *Land & River Improvement Company* for $772.77. Upon the hearing of that motion, November 10, 1897, it was ordered by the court that the motion be, and the same was thereby, denied, with $10 costs. From that order, and from the judgment for deficiency so entered July 27, 1897, the defendant *Land & River Improvement Company* brings this appeal.

We are asked to reverse the judgment for deficiency, and the order refusing to set aside that judgment, for the reason that the complaint fails to state facts sufficient to constitute a cause of action for personal liability of the defendant the

Land & River Improvement Company for such deficiency. Had such objection been made at the proper time and in the proper manner, it probably would have been available. It is true that it is one of the objections which is not waived by failing to raise the same by demurrer or answer. R. S. 1878, sec. 2654. Had the company appeared, however, and demurred *ore tenus*, much greater latitude of presumption would have been indulged to sustain the complaint than upon a regular demurrer thereto. *Hagenah v. Geffert*, 73 Wis. 636. Under that section it has also been held by this court that it is too late, on appeal, after evidence tending to show a cause of action has been admitted without objection and instructions given without exception, to invoke the objection that no cause of action is stated. *Vassau v. Thompson*, 46 Wis. 345. The complaint in the case at bar was sufficient to inform the company that the plaintiff claimed that it was personally liable, as indorser, for any deficiency, and that judgment would be taken against it for such deficiency. The complaint was personally served upon the *Land & River Improvement Company*, but it made no appearance, and, of course, made no objection to proofs, nor otherwise. The judgment taken was strictly in accordance with the prayer for relief. R. S. 1878, sec. 2886. This court has recently held that where a defendant preserves no exceptions to findings, and perfects no bill of exceptions, but bases his appeal on the record simply, he cannot take advantage of any defect in the complaint for foreclosure of the mortgage, arising from failure to make appropriate allegations on which to base reformation or discharge of the mortgage. *Kane v. Williams*, *ante*, p. 65.

But there is another satisfactory reason why the objection now raised is unavailable. The judgment of foreclosure and sale entered June 1, 1897, determined the rights of the parties. It adjudged the *Land & River Improvement Company* to be liable for any deficiency. That judgment is binding upon the appellant, and is not appealed from. *Kane v. Will-*

iams, supra; Gaynor v. Blewett, 86 Wis. 399. The judgment for the deficiency was not entered until nearly two months afterwards, and the motion to set aside that judgment was not made until a subsequent term.

By the Court.—The order and judgment of the circuit court, appealed from, are both affirmed.

ROCK, Appellant, vs. COLLINS, Garnishee, Respondent.

May 5—May 24, 1898.

Garnishment: Amendment of answer: Waiver: Chattel mortgage by partnership: Fraudulent conveyance.

1. To permit a garnishee defendant, whose original answer was a denial of liability under the statute, to amend such answer at the trial, after the plaintiff's evidence is in, by admitting his holding of certain property of the principal defendant and setting forth the facts showing that he holds the same as collateral security for a debt owing him by such defendant, was not an abuse of discretion.
2. The objection that a garnishee's answer is not verified is waived if not made at the time the same is filed.
3. One partner has power, in the absence and without the knowledge of his copartner, to execute a chattel mortgage of the partnership property to secure a *bona fide* partnership debt.
4. Whether or not one partner may, without the consent of his copartner who is accessible for consultation, execute a mortgage of the entire firm property to secure a firm debt, when the effect of such mortgage will be to practically terminate the business of the firm, the subsequent acquiescence or consent of the other partner will remove all question as to the validity of the mortgage.
5. A chattel mortgage is not rendered void by the fact that the note secured by it is not correctly described therein, if it is so far described that it appears to a reasonable certainty to be the one intended to be secured.
6. Evidence that the amount of the debt stated in a chattel mortgage given to secure a partnership debt includes an individual debt of one of the partners, though tending to show fraud, may be re-

pelled by the circumstances surrounding the transaction. Such a mortgage will be a lien only for the partnership debt.

7. The fact that the garnishee took an absolute deed of property as additional security, instead of a mortgage, is not conclusive evidence that the transaction was fraudulent, where there is evidence of good faith and the absence of fraudulent intent.

APPEAL from a judgment of the circuit court for Douglas county: E. W. HELMS, Judge. *Affirmed.*

This is an action of garnishment in aid of execution, commenced November 9, 1895. Execution was issued on a judgment in favor of the plaintiff, *Rock*, and against Jacob E. Erickson, Nettie C. Erickson, and Michael Collins, as copartners. The original garnishee answer was a statutory denial of liability, upon which issue was joined. Upon the trial an amended answer was allowed, also denying liability, but admitting the possession of certain property under a chattel mortgage, and a deed of standing timber, executed to the garnishee by the firm of Erickson & Collins, as collateral security for the debt.

The issues were tried by the court, and findings were made substantially as follows:

(1) That the plaintiff's judgment was recovered November 9, 1895, against Jacob E. Erickson, Nettie C. Erickson, and Mike Collins, as copartners.

(2) That the garnishee defendant had no dealings whatever with the defendant Nettie C. Erickson; and that the firm of Erickson & Collins was composed of Jacob E. Erickson and Mike Collins; and that the property held by the garnishee was property formerly belonging to the firm of Erickson & Collins, and received by the garnishee from that firm.

(3) That, at the time of the service of the garnishee summons, the garnishee defendant had in his possession seven draft horses and a considerable amount of other personal property, which is described at length and comprises a

logging outfit, which had been previously owned by Erickson & Collins, and used by them in a general logging business; also a town order for $300, in favor of Jacob E. Erickson, which had been turned over by said firm to the garnishee defendant as collateral to the firm's indebtedness to him; also a certain accepted order made by the firm upon one John A. Bardon, all of which property was held by the garnishee defendant as security for the debt of Erickson & Collins to him.

(4) That the garnishee defendant, on the 2d day of July, 1894, loaned the firm of Erickson & Collins $1,200 in cash, and took their note therefor, with interest at ten per cent.; and that no payment had been made upon said note at the time of the execution of the collateral securities aforementioned, except interest up to the 17th day of February, 1895.

(5) That, during the winter of 1894 and 1895, the garnishee had loaned to the defendant Mike Collins about $150, most of which was used by said Mike Collins personally, but that, when said moneys were advanced, Mike Collins agreed to give a firm check for the sum, but no firm security had been given therefor.

(6) That, during the winter of 1894 and 1895, Erickson & Collins had a contract with one Gilbert, of Duluth, Minnesota, for the sale of a large quantity of logs, to be paid for upon delivery at the mouth of the Nemadji river; but that said firm were unable to deliver said logs in the spring of 1895 without the construction of expensive dams, and consequently said firm were greatly embarrassed, and were in financial difficulties.

(7) That said firm were indebted to various creditors in the spring of 1895 to an amount exceeding $6,000, and had no money to pay such debts except as they should receive it from said Gilbert contract, and were at that time grossly insolvent, and the garnishee defendant knew that they were being pressed by creditors and were insolvent.

(8) That in May, 1895, the garnishee defendant demanded payment of his note, and finally, in June, Jacob E. Erickson gave an order upon Gilbert, in favor of John A. Bardon, cashier of the Bank of Superior, for all moneys which might become due the firm from Gilbert, which order was accepted by Gilbert conditionally, after deducting all counterclaims against Erickson & Collins; and a further order was then given by Erickson on behalf of the firm to John Bardon, in favor of the garnishee defendant, which order was accepted by Bardon, payable out of any moneys received by him from Gilbert on account of the logging contract.

(9) That all the negotiations with regard to said order were made on behalf of the firm by Jacob Erickson, the said Mike Collins having been absent from the city of Superior from the latter part of May until the latter part of June, and his whereabouts being unknown; that, during said absence, Erickson, on behalf of the firm, gave a chattel mortgage upon a portion of the logging outfit of said firm for the sum of $1,000, to another creditor of said firm.

(10) That Mike Collins returned to Superior in the latter part of June, 1895, and executed and delivered to the garnishee defendant, July 8, 1895, a chattel mortgage upon the logging outfit, as security for the said $1,200 note held by the garnishee defendant, with accrued interest and the $150 which had been loaned by the said garnishee to Mike Collins; and that Mike Collins also executed, at about the same time, to the garnishee, on behalf of the firm, a quitclaim deed of certain timber which was held by the firm under a contract giving them the right to cut and remove said timber within a certain time, it being supposed that such right was worth, perhaps, $1,000 or $1,200, but no proof being introduced on the trial of the value thereof; that said deed was given to secure the said $1,200 note; that said chattel mortgage was executed without the knowledge of Erickson, but that Erickson learned of its existence in August following, but made no objection to the mortgage at any time.

(11) That the garnishee defendant took possession of that part of the property described in his chattel mortgage which was not covered by chattel mortgages of other creditors, about November 1, 1895, and was in possession thereof when the garnishee summons was served on him, and caused the same to be sold on his mortgage at public sale, November 16, 1895, and bid the same in for $400, the reasonable value thereof at the time of the service of the summons being $550.

(12) That, at the time of the service of the garnishee summons, no part of the $1,200 note had been paid, except the sum of $220, paid to him by Bardon in October, out of the moneys received by him on the so-called Gilbert order.

(13) That the said chattel mortgage and other securities obtained by the garnishee defendant from said firm were taken by him in good faith, as security for his claim against the firm, and without intention on his part to hinder, delay, or defraud any of the creditors of Erickson & Collins.

(14) That, at the time of the commencement of the garnishee action, the garnishee defendant was entitled to hold all the property then held by him of the defendants to an extent necessary to satisfy the balance due on his $1,200 note and interest.

(15) That there is due and owing the plaintiff upon his judgment against Jacob E. Erickson, Nettie C. Erickson, and Mike Collins the sum of $353.59, with interest from December 12, 1895.

Upon these facts, the court found that the garnishee defendant was rightfully in possession of all the property which he then held, formerly belonging to Erickson & Collins, and was entitled to hold the same until payment of the balance due upon his note of $1,200, and that the plaintiff's complaint should be dismissed, with costs. From a judgment in accordance with these findings, the plaintiff appeals.

For the appellant there was a brief by *C. R. Fridley* and *A. T. Rock*, and oral argument by *Mr. Rock*. They argued,

among other things, that it was an abuse of discretion to permit the garnishee to file his amended answer in this case, because it is inconsistent with his original answer, and it changes the issue. Sec. 2830, S. & B. Ann. Stats.; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 125, 140. It was not verified. Secs. 2759, 2763, S. & B. Ann. Stats.; *Davis v. Pawlette*, 3 Wis. 300; *Platt v. Sauk Co. Bank*, 17 id. 222. It was his absolute duty to state the facts in his original answer. Sec. 2760, S. & B. Ann. Stats.; *Lusk v. Galloway*, 52 Wis. 164; *Schuerman v. Foster*, 82 id. 319. To admit it at the trial acted as a surprise to the plaintiff. 2 Wade, Attachments, § 371; *John R. Davis L. Co. v. First Nat. Bank*, 84 Wis. 1–3. It was error to admit the chattel mortgage in evidence and, to support it, a note not correctly described therein. Herman, Chattel Mortgages, § 59; *Whiting v. Beebe*, 12 Ark. 421; *Shores v. Doherty*, 65 Wis. 153; *Follett v. Heath*, 15 id. 601; *Andrews v. Powers*, 35 id. 644. It was a fraud for the garnishee, being amply secured and knowing that his debtors were insolvent, to take an absolute deed as additional security. *Bleiler v. Moore*, 94 Wis. 385; *Collins v. Corwith*, id. 514; *Lombard v. Dows & Co.* 66 Iowa, 243. One partner cannot dispose of property necessary to carry on the partnership business, either in payment of, or as security for, a firm debt, without the consent of his copartners. Bates, Partnership, § 401; *Hewitt v. Sturdevant*, 4 B. Mon. 453; *Mussey v. Holt*, 24 N. H. 248; *Lowman v. Sheets*, 124 Ind. 416; *Hudson v. McKenzie*, 1 E. D. Smith, 358; *Drake v. Thyng*, 37 Ark. 228; *Blaker v. Sands*, 29 Kan. 551; *Sloan v. Moore*, 37 Pa. St. 217. The partner who executed the mortgage committed a fraud upon his copartners in applying partnership property to the payment of his individual debt. *Rogers v. Batchelor*, 12 Pet. 229; *Dob v. Halsey*, 16 Johns. 34; *Davenport v. Runlett*, 3 N. H. 386; *Sauntry v. Dunlap*, 12 Wis. 364; *Viles v. Bangs*, 36 id. 131; *Keith v. Armstrong*, 65 id. 225. The fraud vitiates the whole trans-

action. Taking an absolute deed as a security is a badge of fraud. *Sims v. Gaines*, 64 Ala. 392; *Ladd v. Wiggin*, 35 N. H. 426; *Chenery v. Palmer*, 6 Cal. 122.

For the respondent there was a brief by *Catlin, Butler & Lyons*, and oral argument by *Thos. E. Lyons.*

WINSLOW, J. The evidence in this case was voluminous, and it is not deemed necessary to review it in this opinion. It is sufficient to say that there was ample evidence to sustain the findings of the trial court, and hence the questions to be discussed will be simply questions of law.

1. A question of practice is raised. The original answer of the garnishee defendant consisted of a denial of liability under the statute. Upon the trial, and at the close of the plaintiff's testimony, the garnishee defendant was allowed to interpose an amended answer, against a general objection by the plaintiff, setting forth the facts as to the holding of the collateral securities. This answer was not verified, but no objection was made upon that ground, nor was any surprise claimed; and in fact it is difficult to see how any claim of surprise could be made, because the transactions set up in the amended answer were the very transactions upon which the plaintiff's claim of liability was founded. We can see no error in this ruling. Such amendments are frequently allowed at the circuit, and their allowance rests in the sound discretion of the trial court. If the objection that the amended answer was not verified was relied on, it should have been made at the time of the filing of the answer. Not being made at that time, it was waived. *Grace v. Newbre*, 31 Wis. 19.

2. It is objected that the chattel mortgage upon the logging outfit was invalid, because made by one partner alone, without the knowledge of his copartner. The general power of one partner to pay firm debts out of firm property in the ordinary course of business is well established; and, if he

may pay a debt, no good reason is perceived why he may not secure its payment by pledging or mortgaging firm property. It has been held by this court that one partner may, in the absence of his copartner, mortgage the firm property to secure a *bona fide* partnership debt (*Hage v. Campbell*, 78 Wis. 573); also, that one partner may make a valid voluntary assignment of the personal property of the firm for the benefit of creditors where the other partner has absconded (*Voshmik v. Urquhart*, 91 Wis. 513). There has been some diversity of opinion upon the question whether one partner may, without the consent of his copartner who is accessible for consultation, mortgage the entire firm property to secure a firm debt, when the effect of the mortgage would be to practically terminate the business of the firm, although the weight of opinion seems to favor the validity of such a mortgage. Jones, Chattel Mortgages, § 46. But it is certain that the subsequent acquiescence or consent of the other partner would remove all question as to the validity of the mortgage. Jones, Chattel Mortgages, *supra*. Such acquiescence was proven in the present case.

3. It is claimed that the mortgage was void, because the note which it was given to secure was not correctly described, and because it was intended to secure thereby the individual debt of Mike Collins as well as the firm debt. The note held by the garnishee defendant was for $1,200, and was dated July 2, 1894; but it was described in the chattel mortgage as a note for $1,400, bearing date July 2, 1894. The evidence shows beyond question that the $1,200 note was the only note held by the garnishee, and that it was intended to be secured by the mortgage. The difference in amount arose from the fact that there was about $50 of interest due upon it, and the parties attempted to include in the mortgage the $150 indebtedness of Mike Collins. Thus, it appears that the correct date was given, but not the correct amount. It is not like the case of *Follett v. Heath*, 15 Wis. 601, where the

description of the debt was false in every respect, but rather like the case of *Paine v. Benton*, 32 Wis. 491, where the description was correct in some particulars and false in others, and where it was shown by the proof that the note in evidence was the note intended to be secured. "It is sufficient if the note is so far described that it appears with reasonable certainty to be the note intended to be secured." *Weber v. Illing*, 66 Wis. 79. The fact that the individual indebtedness of Mike Collins of $150 was attempted to be covered by the mortgage, and that the amount of the mortgage was thus improperly swelled to $1,400, was undoubtedly evidence tending to show fraud, but did not necessarily render the mortgage fraudulent in law. The inference of fraud may be repelled by the circumstances surrounding the transaction. *Bradley Co. v. Paul*, 94 Wis. 488. In the present case the trial court was of the opinion that the inference of fraud was overcome by the proofs, and we cannot say that such conclusion was wrong. The mortgage is only security for the amount of the firm debt secured thereby, and, as to the individual debt of Mike Collins, it is not a lien. *Cribb v. Morse*, 77 Wis. 322.

4. The garnishee defendant took an absolute deed of certain timber, as additional security for the payment of his debt; and it is now claimed that the fact that he took a deed, instead of a mortgage, is quite convincing evidence of fraud. Undoubtedly, the fact that the deed does not truly state the exact transaction, and hence is well calculated to deceive creditors, is to be considered; but deeds are frequently given as security only, and, when they are satisfactorily shown to have been given in good faith and without intent to defraud, we know of no iron-clad rule which declares them void. Bump, Fraud. Conv. (4th ed.), § 55; *Carey v. Dyer*, 97 Wis. 554.

5. There are many claims of error in the admission of evidence; but as this action was tried by the court, and as

there was ample competent evidence to sustain the findings, it becomes unnecessary to consider these claims. It does not seem necessary to discuss other points made, as they relate to questions or inferences of fact, and we have discussed all the purely legal questions which are of any serious importance, involved upon the appeal.

By the Court.—Judgment affirmed.

COLLINS, Appellant, vs. HOEHLE, Respondent.

May 5 — May 24, 1898.

Witness, impeachment of.

The rule that a party cannot impeach his own witness is violated by permitting such party to read from the testimony given by such witness in another case, and to examine him in relation thereto, for the purpose of contradicting his testimony at the trial.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Action for the conversion of certain personal property described in the complaint of the alleged value of $400, being a part of a logging and lumber camp outfit, alleged to have been taken by the defendant by his duly-authorized agent and deputy November 12, 1895, and converted to his own use. The cause was tried at the August term of the circuit court for Douglas county, but the verdict then rendered, and the judgment entered thereon, were afterwards set aside, and a new trial ordered, which resulted in a verdict and judgment in favor of the defendant, from which the plaintiff appealed.

The defendant justified the taking and conversion charged as sheriff of Douglas county, under an execution issued upon a judgment rendered November 9, 1895, in the municipal

court of Douglas county, in an action wherein A. T. Rock was plaintiff, and J. E. Erickson, Michael Collins, and Nettie C. Erickson, copartners as Erickson & Collins, were defendants, for the sum of $489.05 damages and $7.75 costs. Said execution was directed to the defendant, *Hoehle*, then sheriff of Douglas county, by virtue of which he levied on the goods and chattels mentioned in the complaint, and, after having advertised them for sale on execution, sold them accordingly, and paid over to A. T. Rock, the execution creditor, the sum of $146.60, being the proceeds of the sale, less $50.50, his lawful costs and disbursements. Such taking, sale, and conversion are the grounds of the plaintiff's cause of action.

The defendant alleged that the only right, title, and interest which the plaintiff claims or had to any of the goods and chattels levied on and sold was derived from and under a chattel mortgage thereon, dated May 16, 1895, purporting to have been executed by the firm of Erickson & Collins, said execution defendants, which mortgage, it is alleged, was fraudulent and void as against their creditors, particularly the said A. T. Rock, because it was executed and delivered to the plaintiff, *John Collins*, by Michael Collins, purporting to act for and on behalf of said firm of Erickson & Collins, but without the knowledge or consent of the other members of said firm, and that the said act of Michael Collins had never been ratified; that at the time said mortgage was given said firm of Erickson & Collins was hopelessly insolvent, and indebted to various parties in large amounts, which they were unable to pay — all of which the plaintiff herein, *John Collins*, well knew. It was further claimed that it had been given long after the firm of Erickson & Collins had been dissolved, and not only to secure an alleged debt of said firm to the plaintiff, but a debt of $200 owing to him by Michael Collins as well, at the request of *John Collins;* that it was given and received for the express purpose of defrauding the other member or members of said

firm of Erickson & Collins, and to hinder, delay, and defraud the creditors of said firm, especially A. T. Rock, said execution creditor,— all of which was well known to the plaintiff, *John Collins*, the mortgagee.

It appeared from the testimony of the deputy sheriff and of John Collins, Jr., that the property in question was in the possession of said John Collins, Jr., under a chattel mortgage to *John Collins, Sr.;* that Mike Collins is the Collins that was a member of the firm of Erickson & Collins, namely, Mike Collins and Jake Erickson. The plaintiff testified, in substance, that he had loaned the firm of Erickson & Collins the sum of $2,000, $800 of which they had paid, and that he loaned them $1,200 more, the firm giving him a note, which James Collins signed, but that he did not receive any part of the money which was actually given to Erickson & Collins; that said firm was then indebted to various creditors in considerable amounts, and did not have money to pay their debts, and no money was coming to them unless they could get it from Gilbert on their logging contract; that the mortgage of July 8th was for the $1,200 note and the $200 advanced to Mike Collins from time to time, as stated in the testimony; that he got the mortgage from Erickson & Collins as a company, and went right up the same day, and put it on record; that at the time the mortgage was given to him he had received no payment on the note, no part of the principal, but there was some interest due at the time; that they were owing him other moneys at the time; that he loaned them in the neighborhood of $200. The note, Exhibit C, is the note which the chattel mortgage, Exhibit A, was intended to secure. Exhibit C was then received in evidence, as well as said Exhibit A. Considerable evidence was produced by the defendant tending to show that the note and mortgage under which the plaintiff claimed title to the property in question were fraudulent and void as against the creditors of Erickson & Collins, the mortgagors.

The plaintiff testified that he took possession of all the property under his mortgage, and claimed to hold all of it for the payment of the same. "The mortgage, I suppose, is to cover the $1,200, and the balance that was loaned afterwards. But nothing was ever said to me about giving me a $4,000 mortgage. I was never offered and never agreed to take a $4,000 mortgage. Never had a talk with Jake or Mike or anybody else about a $4,000 mortgage. All I looked for in any of my talks with Mike or Jake was to secure the payment of the debt which Erickson & Collins owed me; I didn't have any other object. I don't think I did have a talk with Mike about security before he went away. I don't remember it if I did. If I did testify that way last fall in this court, I testified to the truth certainly. I got this mortgage after Mike came back. I held this note of $1,200 and the firm owed me $200 besides. This $200 made up the borrowed money. I gave it to Mike Collins for company purposes." Thomas E. Lyons, a witness for the plaintiff, testified that some time in May, 1895, Mike Collins came to his office and directed a chattel mortgage to be drawn up for $4,000; that he drew the mortgage, and at that time two or more typewritten copies were made; that Mike took one of them away, and the other remained in the office. "In July — I think the 8th — Mike and his father came to the office, and wanted a chattel mortgage drawn up, and I took the copy which remained in the office, and made changes in the amount and the description of the note as it now stands, and it was then executed and delivered to *John Collins*."

The defendant moved to dismiss the action, and for a nonsuit upon the whole case, and more particularly for the reason that the evidence showed that the mortgage in question was given to secure the $1,200 note, with interest reckoned at $85, and the private account of Mike Collins, aggregating $200, and that the evidence showed the mortgage to be fraudulent and void.

Michael Collins, a witness for the defendant, testified: "I was formerly a member of the firm of Erickson & Collins and signed defendant's Exhibit 6. I think it was on the 16th of May, 1895. I and Jake Erickson had some conversation, in which it was understood that this mortgage should be drawn. Q. What was the conversation? *Mr. Lyons:* We [the plaintiff] object to any evidence as to the parties' object in the drawing of this $4,000 chattel mortgage,—conversations between Erickson and Collins in reference to it. *The Court:* It is admitted on the express statement of counsel that they will show plaintiff's connection with and knowledge of it. (Exception taken.) *Witness:* The conversation was that Erickson and I talked over our business matters, the situation of the firm, and the $1,200 that we owed my father, and came to the conclusion that we would not pay that $1,200 at that time; that we would draw up a mortgage in his favor for that $1,200 debt, but with the intention that, if we got hard up, we probably might get some money from him to help us out in the business. At that time we had lots of money coming to us to pay our debts. My father was not there when we had that talk. I did not subsequently have a talk with my father concerning the conversation or arrangements that I and Jake reached. I never had any talk with my father about that $4,000 mortgage. I was sworn on the trial of the case of Olson against Collins in the superior court. Q. I will ask you if you did not testify in that case as follows concerning your father's knowledge of this mortgage (offering to read from a transcript, defendant's Exhibit 7). (Objected to by plaintiff as incompetent, irrelevant, immaterial, and also upon the ground that the defendant cannot impeach his own witness. Objection overruled, and exception.) The following questions and answers were then read to witness from the transcript of his testimony given in the superior court, in the case of Sam Olson against John Collins: 'Q. Did he (meaning your father) know anything

about this proposition of yours and Jake's, when you had this mortgage first drawn, to have it drawn for $4,000, and give it to him to secure him? Didn't you tell him about that? A. Yes, sir.' Q. Did you so testify in the superior court? A. I don't remember testifying that. I don't believe that I ever told him. If I did so testify it is not true. (Reading further from transcript): 'Q. Did you tell him at the time what your object was in doing it? A. Yes, sir.' I don't remember so testifying in the superior court. If I did so testify it is not true. Q. What was that mortgage of $4,000 drawn for? (Objected to by plaintiff as immaterial. Objection overruled, and exception.) A. It was drawn for the purpose of staving off this debt of $1,200, and of raising some money,—in getting the money that we had due us to pay our other creditors, and still go on with our work. I requested Mr. Lyons to draw this mortgage, but it was by request of both Erickson and myself. Q. Was not one of the purposes for which this mortgage was drawn to stand off the rest of your creditors until such time as you could get your logs down? (Objected to as irrelevant and immaterial. Objection overruled, and exception.) A. I expect it was partly for that purpose. I suppose that had something to do with the making of this mortgage for so much. I executed this mortgage in Mr. Lyons' office. Then took it, and gave it to Jake Erickson. He said he would take it, and think it over."

Jacob E. Erickson, a witness for the defendant, testified that he was requested to go up to Mr. Lyons' office, and sign the instrument, by Mike Collins; and the old man, *Mr. Collins* (the plaintiff), was present there. "I told him I would look it over, and see what it was, and then he handed it to me, and I kept it. The plaintiff in this case had some further talk with me about signing this mortgage at my house. It was after Mike had gone away, and before he came back. He says, 'Why don't you sign the mortgage, or the paper?'

I think he used the word 'paper,' or he wanted the note paid. He asked me why I didn't sign the paper. I told him it was more than the $1,200 note called for,—$4,000,—and that I would not do anything then without consulting our attorney, Mr. Rock. I had some other talk with him about signing that mortgage up in Catlin, Butler & Lyons' office. It started with giving an order on Gilbert for his note, and I told him I wouldn't give any order. That was before Mike got back, and after he had gone away. I don't recollect that I ever had any other talk with him about security. Q. Now, Jake, how did it come that this $4,000 mortgage that you hold there was drawn? (Objected to as irrelevant, incompetent, and immaterial. Objection overruled, and exception.) A. The purpose or object for which the mortgage was drawn was to bar other creditors out,—depriving other creditors from deriving any benefit from what was in the concern. Mike Collins, talking it over, suggested that we draw up a mortgage for $4,000 to bar other creditors out from deriving any benefit out of what was in the concern. At that time the firm was heavily indebted. There were bills pressing and one or two suits pending at the time. I believe there was one judgment. The firm did not then have money to pay these bills with that were due and pressing. I believe the indebtedness of the concern was somewhere between four and five thousand dollars, including the *Collins* note."

The defendant then offered in evidence page 30 of the transcript of the testimony of the witness Mike Collins given in the superior court in the case of Olson against Collins, and the same was received, and read to the jury, over plaintiff's objection. "Q. You and Jake frequently talked over the situation of your affairs in connection with his claim against you? A. Yes. Q. He knew about how your business stood, didn't he? A. My father? Q. Yes, sir. A. I

think not. Q. He knew you were owing people? A. I don't know as he did. Q. You never told him so, did you? A. No, sir. Q. Did he know anything about this proposition of yours and Jake's, when you had this mortgage first drawn for $4,000, and gave it to him to secure him? Did you not tell him about that? A. Yes, sir. Q. Didn't you tell him at the time what your object was in doing it? A. Yes, sir."

Defendant offered in evidence page 14 of transcript of plaintiff's evidence given in the former trial of this case, as follows: "I don't think Erickson & Collins had money at that time to pay the bills that were being pressed. Erickson said it, and Mike Collins, too. He told me in that conversation about Jake wanting to make an assignment. You and him had papers got out for an assignment, and he wouldn't sign it, and they wanted him to sign it, and he wouldn't do it."

Defendant then offered in evidence page 2 of the deposition of plaintiff taken before C. R. Fridley, court commissioner: "I didn't have any conversation with Erickson & Collins, or either of them, relative to giving me security for that debt when they borrowed the money. I did last May. I had a talk with both of them. I didn't ask them for a mortgage. They offered to give me a mortgage. I knew the firm was indebted to several other people. I learned while Mike was away that several other men, whom they were owing, were pressing payment of their claims. I didn't suppose they had any money at that time to pay either my claim or any other claim that was due."

At the close of the testimony the plaintiff moved the court to strike out all the evidence relating to the agreement of Erickson & Collins to give a $4,000 mortgage to the plaintiff for the purpose of hindering and delaying their creditors, and to the execution, preparing, and signing of that mortgage, which motion was denied, and exception taken. The plaintiff moved the court to direct a verdict in his favor,

which motion was denied, and the plaintiff excepted. The jury found a verdict in favor of the defendant, and the court denied a motion to set the same aside and grant a new trial.

For the appellant there was a brief by *Catlin, Butler & Lyons*, and oral argument by *Thos. E. Lyons.*

A. T. Rock, for the respondent.

PINNEY, J. The cross-examination by the defendant of his own witness Michael Collins, and the introduction of contradictory statements made by him, was for the purpose of his impeachment, and, beyond doubt, was effective for that purpose. The defendant voluntarily called Mike Collins as a witness in his own behalf, without being under any legal necessity or obligation to do so. Under the universal and well-settled rule of evidence, the defendant should not have been allowed, under the circumstances stated, to impeach him. This rule was violated repeatedly, and in a marked degree, as the foregoing statement of the case clearly shows. The law upon this subject in this state has been definitely settled. *Richards v. State*, 82 Wis. 172–180. The rule is there stated to be that, while a party may show that the testimony of his own witness is incorrect or false in a matter material to the issue, he cannot be allowed to impeach such witness by direct testimony either of his bad reputation for veracity, or that he testifies to one thing in court and asserts the falsity of it out of court. This rule is elementary. The defense sought to establish, by the testimony of Mike Collins, a fraudulent intent on the part of Erickson & Collins and participation in it by the plaintiff. The admission in evidence of his statement to the effect that he had informed the plaintiff of such intent could not but exercise a prejudicial influence upon the plaintiff's case.

In *Smith v. Dawley*, 92 Iowa, 312, one Effie Childs was a witness for the defendant, and her testimony was favorable in part to the plaintiff, and afterwards the defendant sought

to impeach her by introducing a letter written by her, which the court rejected, and this was assigned as error; but the court upheld the ruling, saying: "Conceding that, if defendant was misled by the witness, and he placed her on the stand in pursuance of what she had said her testimony would be, he might show to the court or jury the facts leading to her being called as a witness, it does not follow that he can be allowed to impeach his own witness in violation of the general, if not of the universal, rule." To the same effect is *Adams v. Wheeler*, 97 Mass. 67, where it was held that a party could not be allowed to prove by a witness statements previously made by a witness called by himself, inconsistent with his testimony at the trial, which would not be admissible as independent evidence, and could have no effect but to impair his credit with the jury. In *People v. Safford*, 5 Denio, 112, where the point was material, the court, after adverting to the conflict of cases and text-books on the subject, proceeded, as it is there said, to consider it on principle, and determined that a party cannot prove contradictory statements made by his own witness. The court held that such evidence is only allowable with a view to the impeachment of the witness, which is not open to the party producing him. In *Thompson v. Blanchard*, 4 N. Y. 303, 311, a new trial was granted for a violation of the rule in question. *Coulter v. Am. Merchants' Union Exp. Co.* 56 N. Y. 585–589; *Stearns v. Merchants' Bank*, 53 Pa. St. 490.

It appears to have been held in England, by the decided weight of authority, that, even when a party was surprised by the testimony of his witness, he could not impeach him by proof of different statements made by him out of court before the trial. But this question was set at rest by a statute allowing a party to prove that his own witness had made a statement inconsistent with his present testimony, but this was allowed only in case, in the opinion of the judge, such witness proved to be adverse, and only after laying the

foundation for impeachment as in other cases. It seems that, although the conflict of opinion upon this question which arose in England has continued in the American courts, it appears to be the rule, supported by the great weight of authority, that, in the absence of statute, a party cannot be allowed to offer direct proof by other witnesses either of the bad character of his own witness for truth and veracity, or that he has previously made statements inconsistent with his present testimony. 3 Jones, Ev. § 858, and cases cited; 1 Greenl. Ev. § 444.

This rule has been so applied that, when one party calls a witness of the adverse party to prove certain facts, he is thereby prevented from impeaching such witness; and so, even where a litigant calls the adverse party as his own witness to prove matters not merely formal, or where he is not compelled by law to call him. In Jones, Ev., *supra*, it is said: "Although the weight of authority sustains the view that a party cannot prove the contradictory statements of his own witness to discredit him, yet the party is not wholly without remedy, if surprised or deceived by the testimony. In such a case he may interrogate the witness in respect to previous statements inconsistent with the present testimony, for the purpose of probing his recollection. He may, in this way, show the witness that he is mistaken, and give him an opportunity to explain the apparent inconsistency. This is also proper to show the circumstances which induced the party to call the witness. But, where the sole effect of answers to such questions would be to discredit the witness, the questions should be excluded; and, if the recollection of the witness is not refreshed after such questions, the party cannot prove his contradictory statements by other witnesses."

The erroneous ruling of the circuit court in this regard requires a reversal of the judgment appealed from.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

HUGUIER, Administrator, Respondent, vs. LORD, imp., Appellant.

May 5 — May 24, 1898.

Appeal: Review on evidence.

On appeal, where the only questions are whether the findings of fact are correct upon the evidence, the judgment will not be disturbed unless the preponderance of evidence is clearly against such findings.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action to recover the amount due on a $1,500 promissory note dated June 25, 1892, due July 1, 1895, made by defendants, payable to Anders Pederson or order, and alleged to have been by him, for value, before maturity, duly indorsed and transferred to plaintiff's intestate, Annie Huguier. The important disputed questions, under the pleadings and evidence, were whether Annie Huguier became the *bona fide* owner and holder of the note, so as to cut off defenses thereto in favor of the makers as against the payee, Anders Pederson, and if not, whether the note was void for want of consideration.

The case was tried by the court, and resulted in findings in plaintiff's favor on both questions mentioned, and that while Pederson owned the note, and was indebted to plaintiff's intestate on a $6,000 note secured by a real-estate mortgage, she partially released such mortgage in consideration of Pederson's transferring to her, as collateral security for the payment of her $6,000 note, the note in suit; that the transfer was made by delivering the note, duly indorsed, to John A. Bardon, agent for Annie Huguier; that after such transfer Pederson died, and thereafter the note was delivered by Bardon to the plaintiff; that the amount due on the debt, for which the note was turned out as security, at the

time of the trial, exceeded the amount due on the note in suit, and that therefore plaintiff was entitled to judgment for the principal and interest due on the collateral note, amounting to $2,076.66.

The evidence shows that about the time the agreement was made to give Annie Huguier collateral security in consideration of her releasing a part of the mortgage security she held as aforesaid, the note in question was in the hands of John A. Bardon, as cashier of the Bank of Superior, and that, for the purpose of temporarily carrying out such agreement, Pederson made and left with Bardon an instrument of which the following is a copy:

"Superior, Wis., June 19th, 1893.

"In case of my death (before a more satisfactory adjustment of this loan), I hereby assign as col. security to Mrs. A. Huguier, or in case of her death, to her son *August Huguier* the within contracts, promissory notes, insurance policies, etc., now left in charge of John A. Bardon as my attorney to complete said transfer and assignments.

[Signed] "A. PEDERSON."

The evidence further shows that some time after the making and leaving of such paper as aforesaid, and while Mr. Pederson was in his last sickness, Mr. Bardon took the note in question to him for the purpose of having a transfer thereof made to Annie Huguier so that she would actually hold the title thereto as collateral security for the payment of the $6,000 note; that to effect such purpose, Pederson indorsed the said note in blank and delivered the same back to Mr. Bardon as agent for Annie Huguier; that he retained the same as such agent till after Pederson's death and until he delivered the same to Annie Huguier, her agent or personal representative.

Exceptions were filed to the findings of fact made on the disputed questions between the parties. Judgment was rendered in accordance with the findings and conclusions of the

trial court for the amount due on the note in suit, and defendant *Lord* appealed.

For the appellant there was a brief by *Hughes & Whitford*, and oral argument by *R. D. Whitford*.

For the respondent there was a brief by *McCausland & Smith*, and oral argument by *E. F. McCausland*.

MARSHALL, J. It is not claimed but that the conclusions of law are warranted by the findings of fact and support the judgment. All errors assigned go to the question of whether the facts were correctly found by the trial court on the evidence. As often heretofore said in similar cases, it is not deemed advisable to discuss evidence in detail, and point out the particular portions which tend to, and those that do not, support the findings. That would only lead to lengthy opinions having no value as guides in future cases. So it is deemed sufficient to say here, in support of the conclusion we have reached, that after a careful examination of the evidence preserved in the record, we are unable to say that it clearly preponderates against the findings of fact; therefore the judgment cannot be disturbed on that ground (*Nicholson v. Coleman*, 90 Wis. 639; *Loeb v. O'Brien*, 93 Wis. 249); and there being no other ground urged, the judgment must be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

ROBERTSON, Respondent, vs. PARKER, Appellant.

May 5—May 24, 1898.

Judge, personal liability for tort: Criminal jurisdiction of municipal judge: Abandonment.

1. In order to render a judge of a municipal court liable in damages for erroneously assuming jurisdiction to pass judgment upon and commit to prison a person brought before him for a crime of which

he had no jurisdiction except to examine and hold to bail or commit for trial, such judge must have acted wilfully, maliciously, or corruptly in exercising such jurisdiction.

2. *It seems* that a municipal judge, invested by ch. 278, Laws of 1895, with jurisdiction "to hear, try and determine all criminal actions arising in said county, not punishable in state prison," has no jurisdiction to try and pass judgment upon a person charged, under sec. 4587*c*, S. & B. Ann. Stats., with abandoning and unreasonably refusing and neglecting to provide for his wife, but his power is limited to holding the accused to bail or committing him for trial.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The complaint alleges that defendant was judge of the municipal court of Douglas county, which court is of limited jurisdiction, with no power to determine a criminal action the punishment for which may be imprisonment in the state prison; that on July 21, 1897, the defendant issued a warrant for arrest of plaintiff to answer the charge of abandoning his wife, under sec. 4587*c*, S. & B. Ann. Stats.; that plaintiff was arrested, and on July 22, 1897, after a hearing, the defendant wilfully, unlawfully, maliciously, and corruptly sentenced plaintiff to the workhouse for Douglas county for thirty days, well knowing that he had no right or jurisdiction so to do; that a commitment was issued, and plaintiff was imprisoned for the space of twenty-two hours, when he was discharged upon a writ of *habeas corpus.* He claims damages in the sum of $500. The defendant entered a general demurrer, which was overruled. The defendant appeals from the order overruling his demurrer.

John A. Murphy, for the appellant, argued, *inter alia*, that the defendant, as judge of the municipal court, under proceedings for the examination of the plaintiff, of which he had jurisdiction by sec. 4587*c*, S. & B. Ann. Stats., acquired jurisdiction of the person of the plaintiff and of the subject matter, and had the right to determine the question of his jurisdiction to pass sentence, and his decision of that ques-

tion was judicial, which, if erroneous, did not render him personally liable. *Austin v. Vrooman*, 14 L. R. A. 138; *Butler v. Potter*, 17 Johns. 145; *Prigg v. Adams*, 2 Salk. 674; *Clark v. Holdridge*, 58 Barb. 64; *Proudfit v. Henmon*, 8 Johns. 391; *Grove v. Van Duyn*, 44 N. J. Law, 654; *Bradley v. Fisher*, 13 Wall. 335; *State ex rel. McCall v. Cohen*, 16 S. C. 198; *Lange v. Benedict*, 73 N. Y. 12; *Ackerley v. Parkinson*, 3 Maule & S. 411; *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688.

For the respondent the cause was submitted on the brief of *Geo. C. Cooper*. He argued that the municipal court of Douglas county was a court of inferior jurisdiction and its judge was protected only when he acted within his jurisdiction. That he acted in good faith was no defense, but that he acted wilfully, corruptly, or maliciously enhanced the damages. *Truesdell v. Combs*, 33 Ohio St. 186; *Sheldon v. Hill*, 33 Mich. 171; *La Roe v. Roeser*, 8 id. 537; *Lanpher v. Dewell*, 56 Iowa, 153; *Piper v. Pearson*, 2 Gray, 120; *Clarke v. May*, id. 410; *Sullivan v. Jones*, id. 570; *Rutherford v. Holmes*, 66 N. Y. 368; *Knowles v. Davis*, 2 Allen, 61; *Downing v. Herrick*, 47 Me. 462. Jurisdiction of the subject matter for one purpose is of no avail in an action for the exercise of excessive jurisdiction. *Patzack v. Von Gerichten*, 10 Mo. App. 424; *Vanderpool v. State*, 34 Ark. 174; Cooley, Torts, 416, 417; *Tramwell v. Russellville*, 14 Ark. 105; *Wickes v. Clutterbuck*, 2 Bing. 483; *Austin v. Vrooman*, 14 L. R. A. 138.

BARDEEN, J. It was conceded on the argument that the defendant, as judge of the municipal court of Douglas county, had no legal right to pronounce judgment against the plaintiff at the time and in the manner set forth in the complaint. Ch. 278, Laws of 1895, invests said judge with jurisdiction "to hear, try and determine all criminal actions arising in said county, not punishable in state prison," and "to hold to bail all persons charged with other offenses

against the laws of the state of Wisconsin." The plaintiff was charged with abandoning his wife, and unreasonably refusing and neglecting to provide for her, contrary to sec. 4587*c*, S. & B. Ann. Stats. This section declares such an offense to be a misdemeanor, and as a penalty provides that such parent or husband, "on conviction thereof, shall be punished by imprisonment in the county jail, not less than fifteen days, ten days of which imprisonment, in the discretion of the court, the food may be bread and water only, or by imprisonment in the state prison not exceeding one year; except in counties having workhouses, commitment may be made to such workhouse in the discretion of the court." Sec. 4587*d* provides that "the several county and municipal courts of the state shall have concurrent jurisdiction with the circuit court of all offenses arising under this act, and every such county and municipal court shall be deemed open at all times to hear, try and determine all cases arising under this act." Other sections provide that the judges of courts of record and court commissioners are authorized to issue process for the arrest and examination of offenders under the act, and that when a person was bound over for trial the record of such examination should be forthwith transmitted to the county or municipal court of the proper county.

Under these provisions, there can be no doubt but that the defendant, as such municipal judge, had full authority to issue a warrant for the arrest of plaintiff upon the proper complaint being made, and to hold and conduct an examination. The complaint is apparently drawn upon the assumption that he had such right, but the contention is that he had no right to *try* the plaintiff for that offense. As examining magistrate, the defendant was acting directly within the lines of his authority. In that regard he had jurisdiction of the subject matter and of the person of the plaintiff, and his authority continued up to the time he assumed to pass sentence and to issue a commitment. At this point he is met with

the question of whether he had a right to pass judgment on the plaintiff. He finds that the act creating the offense provides that the several municipal courts of the state shall have concurrent jurisdiction with the circuit courts of all such offenses. He erroneously decides that the proceedings before him have been equivalent to a trial, and that he is invested with authority to exercise his discretion, and send the plaintiff to the workhouse of the county. He acts upon the assumption that the law giving the municipal courts of the state authority to try and determine such cases gave *him* such authority. In this he was in error. His power to act was limited to holding the accused to bail or committing him for trial. Up to the moment of pronouncing sentence, he had possessed ample power to do what he had done. In the decision of the question that he had jurisdiction to pronounce judgment, did the magistrate render himself liable in damages to the plaintiff? He did erroneously decide that he had power to try the plaintiff, but did such erroneous decision render him, as to all future acts, a trespasser? There are, we frankly admit, decisions holding squarely that it did, but they are based upon the proposition that the rights of the individual are paramount to all public interests involved, and that when such rights are unlawfully invaded his right of redress is absolute. This right, however, has been limited to cases where the offending officer is one possessing inferior or limited jurisdiction. Judges of courts of superior or general jurisdiction possess such immunity, even when it is alleged that they have acted wilfully and corruptly. But, as to officers possessing limited jurisdiction, the lines are drawn tighter, and there are cases in the books holding them to the strictest accountability for their judicial acts. But in later years the doctrine has been somewhat relaxed.

It requires no argument to show that the doctrine of judicial immunity is absolutely essential to the very existence of the judicial office. A magistrate could not be respected

or independent if his motives for his official action, or his conclusions, could be put in question at the instance of every disappointed suitor. In treating of this subject, the text-books and decisions lay down the proposition that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must act within the bounds of his jurisdiction. As a general proposition of law, this statement must be accepted, but the embarrassment arises when it is attempted to be applied to cases in which the public officer is called upon to decide whether or not a particular case is within his jurisdiction, and he falls into error in arriving at that conclusion, and whether he can be held responsible if he acts in excess of his jurisdiction. *Grove v. Van Duyn*, 44 N. J. Law, 654, is a case in which these questions are discussed with great learning and ability. BEASLEY, C. J., thus announces the rule: "When the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable, in a suit, to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one. It protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful. Such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression."

There is a distinction running through many of the cases between a proceeding instituted and carried on by a magistrate, where the initial act failed to secure jurisdiction, or, having secured it, he had lost it by neglect of legal require-

ments, and those where jurisdiction has been secured, and, during the progress of the investigation, the magistrate, in view of the situation, decides that he possesses greater power than he actually possesses. *Brosde v. Sanderson*, 86 Wis. 368; *Frazier v. Turner*, 76 Wis. 562; and *Lueck v. Heisler*, 87 Wis. 644, are cases upon which the magistrate's liability is established under the rule that void process or absolute loss of jurisdiction *pendente lite* renders him responsible to the injured party.

In discussing the question herein involved, we extract the following from Mr. Bishop's Non-Contract Law (§ 783): "Most of the cases exhibit an inclination to be specially severe on justices of the peace and other inferior magistrates, compelling them, in distinction from the rule as to the superior judges, to respond in damages whenever their judicial act was without jurisdiction. But, in reason, if judges properly expected to be most learned can plead official exemption for their blundering in the law, *a fortiori* those from whom less is to be expected, and who receive less pay, should not be compelled to respond in damages for their mistakes honestly made after due carefulness." After stating that the better authorities appear greatly to limit the strict rule of liability, the learned author further says: "Plainly, in reason, if a judicial officer of whatever grade should take jurisdiction where he knew he had none, or without due care to ascertain the law, he should answer in damages to the party injured, and so, it is believed, are the authorities; and in legal reason, also, this should constitute the only exception to the general rule of exemption, as to which the grade of the judicial office should be deemed immaterial." We might cite many other protests and criticisms by courts and text writers condemning the strictness and injustice of the rule. The current of modern legal thought is unquestionably in favor of the proposition cited. *Thompson v. Jackson*, 93 Iowa, 376, 27 L. R. A. 92.

In *Austin v. Vrooman*, 128 N. Y. 229, it was held that a justice of the peace was not personally liable for erroneously deciding that he had jurisdiction to try a defendant who had tendered bail and demanded a trial by jury, where the justice had jurisdiction of the offense and the defendant, except for such offer and demand, if the magistrate acted in good faith. In *Bell v. McKinney*, 63 Miss. 187, the defendant, mayor and *ex officio* justice of the peace, fined and committed plaintiff to jail for an offense committed outside of the corporate limits of the town, over which he had no jurisdiction except to bind the party over to await the action of the grand jury. *Held*, that he was not liable if he acted in good faith. The test in these and many other cases that might be cited is whether the magistrate acted in good faith. It is true that there are cases where the question of good faith is no defense, if the magistrate exceeded his jurisdiction. *Truesdell v. Combs*, 33 Ohio St. 186; *Putzack v. Von Gerichten*, 10 Mo. App. 424; and *Vanderpool v. State*, 34 Ark. 174, are cases holding this rule to the limit of strictness. We are content, however, to join in the increasing procession of states that have adopted and are following the more humane and less stringent test of liability in cases of this kind. We have been led to prolong this discussion because of the very able and earnest argument of counsel on both sides upon this question, and with the hope that it will aid in the future determination of this case.

Returning, now, to the complaint, we find it alleged, in substance, that the act of the defendant, in sentencing and committing the plaintiff, was wilful, malicious, and corrupt, and performed when he well knew that he had no right or authority so to do. The motives and good faith of the defendant are directly challenged, and the demurrer admits the truth of these allegations. It being admitted that, under the law, the sentencing and commitment of

plaintiff were beyond the authority of defendant, and by the pleading that the act was wilfully, maliciously, and corruptly done, and with full knowledge of his want of authority, we see no escape from the conclusion that the complaint states a cause of action.

By the Court.— The order of the superior court of Douglas county is affirmed.

---

99 660
109 105

BARTHELL, Appellant, vs. HENCKE and another, Respondents.

May 6 — May 24, 1898.

Corporations: Attachment of stock: Service on de jure *officer: Collateral attack.*

Where a person who has been illegally elected secretary and treasurer of a corporation has taken possession of the corporate books and papers, and is recognized by the corporation as such officer, his right to the office must be recognized by outsiders. Jurisdiction in proceedings to attach corporate stock under sec. 2989, R. S. 1878, cannot therefore be obtained by service of a copy of the writ on the *de jure* secretary.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Barthell sued the defendants upon promissory notes. The defendants were nonresidents and no service was obtained upon them, but they owned stock in two Wisconsin corporations, and a writ of attachment was issued, and the officer executing the writ attempted to attach such shares of stock under secs. 2738, 2989, R. S. 1878, by leaving a copy of the writ with one Charles E. Barthell, whom he certified to be the secretary and treasurer of both corporations. Charles E. Barthell gave the officer certificates, as required by sec. 2989, R. S. 1878, certifying that the defendants *Hencke* owned certain shares of stock in the said corporations ex-

ceeding in par value the notes sued on, and signed such certificates as secretary and treasurer of the two corporations. The officer made due return of the writ, and an order for service by publication of the summons was duly obtained, under which personal service was made on the defendants in the state of Minnesota. No appearance being made, judgment by default was entered for the amount due on the notes, execution was issued, and the stock levied upon. Thereupon the defendants appeared specially, for the purpose of moving to set aside the attachment, judgment, and execution, upon affidavits tending to show that Charles E. Barthell was not an officer of the corporations at the time of the service of the writ of attachment upon him, nor the custodian of any of their books or papers. Testimony was taken upon the motion, and the court found, among other things, that Charles E. Barthell was, at the time of the service of the writ of attachment, secretary and treasurer *de jure* of both corporations, but that *Fred W. Hencke* was the secretary and treasurer *de facto*, and had possession of the books, papers, and records thereof. Thereupon the court vacated the judgment, attachment, and execution levies as void for want of jurisdiction, and the plaintiff appeals.

H. V. Gard, for the appellant, contended, *inter alia*, that service on an officer who is such officer *de jure* only is good. *Eel River Nav. Co. v. Struver*, 41 Cal. 616; *Badger v. U. S.* 93 U. S. 604; *Salamanca v. Wilson*, 109 id. 627; Beach, Priv. Corp. § 233. There can be no *de facto* officer apart from the *de jure* officer, where there is another individual claiming to hold the title to the office and the right to act therein. Beach, Priv. Corp. § 233; Thomp. Corp. § 3898; *Ellsworth W. Mfg. Co. v. Faunce*, 79 Me. 440; *Genesee Ind. Sch. Dist. v. McDonald*, 98 Pa. St. 444; *Moses v. Tompkins*, 84 Ala. 613.

For the respondents there was a brief by *Titus & McIntosh*, and oral argument by *T. L. McIntosh*.

WINSLOW, J. Corporate stock can only be attached by leaving an attested copy of the writ with "the clerk, treasurer, or cashier" of the corporation, if there be such an officer; otherwise with any officer or person who has custody of the books and papers of the corporation. R. S. 1878, sec. 2989. In the present case the copy was left with a man who had been legally elected secretary and treasurer. Two days prior to the service of the writ, however, meetings of both corporations had been held, and another person had been elected, who had immediately taken possession of the corporate books and papers. No sufficient notice of these meetings had been served on Charles E. Barthell, who owned one share of stock in each corporation. Therefore, although all the other stockholders were present, it seems that no legal election of new officers could be held. Upon this fact the appellant claims that Barthell was still the *de jure* secretary and treasurer, and so that the attachment was effective. This claim, however, cannot be sustained. Conceding that the election of the new secretary and treasurer was invalid, he still took and retained possession of the books and papers of his office, and, as to third persons, he was, to all intents and purposes, the secretary and treasurer of the corporations. The title to corporate offices cannot be tried in this way. One who is acting as officer of a corporation, and who is recognized by the corporation itself, and is in possession of his office, must be recognized as such officer by outsiders in all merely collateral proceedings. His right can only be attacked in a direct action brought for that purpose by a stockholder or by one authorized by law to sue. *People ex rel. McConville v. Hills*, 1 Lans. 202; *Mechanics Nat. Bank v. H. C. Burnet Mfg. Co.* 32 N. J. Eq. 236; 1 Cook, Stock, § 620; 3 Thomp. Corp. § 3897.

It follows that there was no legal attachment of the defendants' stock, and hence that no jurisdiction was obtained, and the proceedings were rightly vacated.

By the Court.— Order affirmed.

DANA, Respondent, vs. DULUTH TRUST COMPANY, imp., Appellant.

99 663
106 530

May 7 — May 24, 1898.

Principal and agent: Purchase of tax title by agent: Reimbursement, when required as a condition of relief: Mortgages: Duty of owner of equity of redemption to pay taxes: Equity: Statute of frauds.

Plaintiff's agent, in duty bound to care for his mortgage securities, agreed with another to purchase a tax certificate on certain of the mortgaged lands, take a tax deed thereon, by judicial proceedings quiet title thereto as to all persons but plaintiff, such other to obtain a deed from the mortgagor, take possession of the lands and collect the rents in the meantime for such agent's use, and then that the property should be sold, plaintiff's mortgage be paid, such agent be reimbursed for his expenditures not covered by rents received, and the balance be divided between the parties to the enterprise. The agreement was made and carried out without knowledge of plaintiff, up to and inclusive of perfecting the title under the tax deed, such other taking the deed from the mortgagor, with a covenant therein to pay the mortgage debt. In the meantime the value of the property depreciated so as to be inadequate to secure plaintiff's debt. Upon plaintiff's discovering the facts, action was brought to vacate the tax deed, and the agent defended upon the theory, only, that he possessed a lien for taxes, merged in the deed, paramount to the principal's lien under his mortgage. *Held:*

(1) That the rule, that an agent cannot speculate with property of the principal under his charge, to the prejudice of the principal, renders voidable a tax deed obtained by such agent, of such property, which is satisfied in equity, however, by requiring the principal, as terms of avoiding such deed, to reimburse the agent for the expenditures necessary to protect such principal's interest in the land, with interest thereon.

(2) That the rule requiring such reimbursement does not apply where the agent is in receipt of rents from the property sufficient to pay the taxes, nor in any case, unless the agent, by a proper showing, places the court in a position to do complete equity by its decree.

(3) That where the plaintiff shows the existence of the relation rendering the taking of the tax deed wrongful, circumstances calling for terms of setting it aside, under the rule stated, are purely

defensive, and unless made to appear, the judgment should go absolutely.

(4) That when a person, so circumstanced as to be in duty bound to pay the taxes, purchases a tax certificate or takes a tax deed, it operates as a redemption from the taxes and gives such purchaser no right to a lien to recover his expenditures.

(5) That it is the duty of a person, in possession under a deed conveying to him an equity of redemption from a mortgage, to pay the taxes on the property, and if the possession and title are held in trust for the grantee and another, both are bound to pay the taxes as between them and the mortgagee of the property, so that the purchase of a tax certificate on the property by either operates as a redemption from the tax.

(6) That the fact that the agreement between the person in possession and holding the title and such other is verbal and void under the statute of frauds, cannot be invoked by either in defense of a claim under the tax certificate or tax deed, under the rule that courts of equity will not permit the use of the statute of frauds to commit a fraud.

(7) That an agreement, stated in the foregoing, having been made and partially carried out without the knowledge of plaintiff, on the theory that his interests were not to be imperiled, the agent became thereby estopped from changing his position in that regard to plaintiff's prejudice.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

An action in equity involving the question of whether a real-estate mortgage owned by plaintiff is a lien on property described therein, paramount to the claim of defendant *Duluth Trust Company* under a tax deed acquired by such company while acting as agent for the plaintiff in respect to caring for his mortgage securities, including the one in question. The trial court found the issue of law in plaintiff's favor on the following facts:

From May, 1892, to November, 1894, the trust company was plaintiff's agent in respect to loaning money on real estate in Duluth, Minnesota, and Superior, Wisconsin, and collecting and remitting interest paid on such loans, and

looking after his affairs in regard to mortgage securities, among them that in question, not receiving or expecting any compensation for its services other than indirect benefits growing out of being able, through the arrangement with plaintiff, to place loans for him and make commissions thereon from the borrowers. On the 1st day of October, 1893, while acting as such agent, the trust company acquired by purchase, at its face value of $233.91, a tax-sale certificate on the mortgaged property, on the tax sale of 1892 for the taxes of 1891, and concealed that fact from the plaintiff. On the 24th day of June, 1894, defendant Stephenson, for the consideration of $1, obtained a conveyance from the mortgagors of their equity of redemption in the property, by a deed containing a clause obligating him to pay plaintiff's claim against the mortgagors. Such conveyance was obtained pursuant to an agreement entered into between the trust company and defendants Stephenson and Upham, to the effect that Stephenson should take such conveyance, the trust company perfect the title to the property by a tax deed and the prosecution of an action to judgment, quieting title in it as against all persons but plaintiff; that the company should advance all money necessary in the meantime to protect the title from tax liens, keep up interest due plaintiff, and pay the expenses of the judicial proceedings; that Stephenson and Upham should collect all rents from lessees of the property and pay the same to the trust company to be applied upon its advances; that title being perfected in such company as contemplated, the property should be sold, and out of the proceeds plaintiff's mortgage debt be paid, then the balance due the company for expenditures, under the agreement, and the residue be equally divided between the company and Upham and Stephenson. The entire scheme was carried out up to and inclusive of a judgment of the proper court, quieting title to the property in the trust company against all persons but plaintiff, who was not made a

party. All the defendants, including Upham and Stephenson, allowed the case to go by default. The proceedings mentioned were carried on without knowledge of the facts on plaintiff's part, or of any default of the mortgagors. The date of the trust company's tax deed was April 8, 1895, and May 16th, thereafter, in order to protect its interest, it redeemed the property from the tax sale of 1892 at a cost of $524.34. During all the time mentioned, plaintiff was relying on the trust company as his agent to look after his interest in the property and inform him of anything necessary to be done in the premises. When the mortgagors first made default in the conditions of the mortgage, the property was adequate security for the debt due plaintiff, but by the time he discovered the facts it had greatly depreciated in value and become inadequate security for such debt, and the mortgagors had become wholly insolvent.

The trust company made no claim to the premises under its tax deed, other than a lien to secure a reimbursement of the moneys paid out for taxes, with interest on such moneys from the time paid. The court decided that the company was not equitably entitled to any protection for its expenditures in acquiring tax liens on the property or payment of taxes thereon, and rendered judgment accordingly, adjudging the tax deed, and all claims of the trust company for moneys expended for taxes, void as to plaintiff. From that the trust company appealed.

For the appellant there was a brief by *McCausland & Smith*, and oral argument by *E. F. McCausland.*

For the respondent there was a brief by *Henry J. Jordan*, attorney, and *S. T. & Wm. Harrison*, of counsel, and oral argument by *Mr. Jordan.*

MARSHALL, J. It is familiar that the relations between principal and agent are such that the latter cannot rightfully speculate with the property of the former under his

charge, or acquire any interest therein to the prejudice of his principal. So, if such property be real estate, the agent cannot acquire a valid tax title thereon, or any interest therein, in breach of his duty to his principal. *Geisinger v. Beyl*, 71 Wis. 358. But the rule in that regard is satisfied in equity by avoiding a tax deed wrongfully obtained, at the suit of the principal, on condition of his reimbursing the agent for the money such principal would have been obliged to expend to discharge the tax lien had the agent not acquired it, with legal interest thereon. That is elementary. Authorities need not be cited to sustain it. As counsel for appellant contend, it is so laid down by all text writers and recognized by all courts. *McMahon v. McGraw*, 26 Wis. 614; *Fisk v. Brunette*, 30 Wis. 102; *Geisinger v. Beyl, supra; Ellsworth v. Cordrey*, 63 Iowa, 675; Cooley, Taxation, 502; Blackwell, Tax Titles, § 598; Black, Tax Titles, § 287. The reason of such rule springs from the principle which underlies our whole system of equity jurisprudence, viz. that he who seeks equity must do equity. The tax being a burden on the land, collectible out of that as the primary fund, paramount to all other claims upon it, the mortgagee is obliged to discharge such burden, if those whose duty it is to pay the taxes fail to do so, in order to preserve his security; therefore, if the agent acquires a tax deed of the land wrongfully, he becomes, nevertheless, equitably interested in such land to the extent of the lien for taxes merged in such deed, and entitled to retain such deed to protect such interest. To that extent the agent's equity is superior to that of the principal under his mortgage; therefore such principal, in seeking equity to avoid such deed, must stand ready to do equity by reimbursing his agent so far as the latter's expenditures were necessary to protect the mortgage security.

Appellant contends that the equitable rule stated in the foregoing applies to the facts found by the trial court; hence

that the conclusion of law reached, that plaintiff's mortgage is paramount to the lien of appellant for its expenditures for taxes, is wrong. Whether such contention should be sustained, turns on whether the relation of principal and agent, in respect to the property, existed when the tax lien was acquired, and whether appellant bore any other relation to the property that rendered it its duty to pay the taxes.

From the foregoing it becomes important to determine what appellant's real position was in relation to the property at the time the tax certificate was acquired and the tax deed taken. The evidence and findings are to the effect that the trust company obtained the certificate pursuant to an agreement with Stephenson and Upham that all should jointly go into a speculation to realize as a profit, for equal division between them, the value of such property over and above the debt secured thereby and the amounts necessary to protect the title from tax claims in excess of rents that might be obtained in the meantime. The scheme contemplated that the trust company should purchase the certificate, perfect title thereunder by tax deed and judicial proceedings to bar all persons interested in the property except plaintiff, and advance all moneys necessary for that purpose; that Stephenson, of the firm of Stephenson & Upham, should obtain the equity of redemption from the mortgagors, take possession of the property, collect the rents thereof in the meantime, and turn them over to the trust company to reimburse it to that extent for its expenditures in carrying out the joint enterprise; and that when the title was so perfected, the property should be sold, plaintiff's mortgage debt be paid, appellant be reimbursed the balance of its advances not theretofore covered by rents received, and the residue be then divided between those engaged in the scheme. The facts found further are to the effect that the equity of redemption was obtained pursuant to this arrangement, by a conveyance to Stephenson in which, by an appropriate

clause, he agreed to pay plaintiff's claim and stand in the place of the mortgagors in respect to the covenants in the mortgage; that he immediately took possession of the property and thereafter, for several months, received rents from all buildings thereon and turned the same over to the appellant before the tax deed was taken. Whether such rents were sufficient to reimburse appellant for the cost of the tax certificate, before the tax deed was taken, does not appear, nor whether a sufficient amount was obtained thereafter for that purpose; but appellant had the benefit of the rents, whatever they were. Now here comes in an exception to the rule that an agent, taking a tax deed on his principal's property, is entitled to be reimbursed in equity for the amount of his expenditures which were a lien thereon, viz. that the agent cannot acquire a valid tax deed on the lands of his principal, nor successfully assert a lien under a tax deed so obtained for the amount of taxes represented thereby, if he had in his hands rents and profits from the premises sufficient to reimburse him for the necessary expenditures to take up the tax lien. *Travellers Ins. Co. v. Patten*, 98 Ind. 209. In the same line, though not directly in point, is *Fox v. Zimmermann*, 77 Wis. 414.

It does not appear whether the rents received by appellant were sufficient to cover necessary expenditures for taxes. A necessary part of the accounting, requisite to the court's granting the relief asked, was for appellant to make a complete showing of receipts as well as expenditures, and failing in that, it was right to deny such relief entirely. Upon plaintiff's establishing the relation of principal and agent between him and the trust company, and that it obtained the tax deed in breach of its duty growing out of such relation, plaintiff became entitled to the relief prayed for, unless the trust company made a proper showing to enable the court to determine definitely its equitable claims upon the property. That it failed to do.

But there is another principle which seems to apply to the facts; that is, that a person who, because of his interest in the property, is in duty bound to pay the taxes thereon, cannot obtain a tax deed on such property so as to cut off the rights of others interested therein, or acquire any lien thereon for the money expended for taxes in acquiring such title. The buying of a tax certificate under such circumstances operates merely as a payment of, or redemption from, the tax. *Smith v. Lewis*, 20 Wis. 350. Says Cooley on Taxation (page 501), in substance, this principle is so universal, so reasonable and just, as to scarcely need the support of authority. Show the existence of the duty, and the disqualification to take the tax deed or acquire a tax lien is made out in every instance. That disability applies to the purchaser of the equity of redemption. *Travellers Ins. Co. v. Patten, supra.* In *Avery v. Judd*, 21 Wis. 262, this court held in effect, that the purchaser from a mortgagor, subject to a mortgage, stands in his stead and is in duty bound to pay the taxes the same as his grantor, and if a person so circumstanced acquire a tax deed of the property, it is utterly void; *a fortiori*, that must necessarily be the case when the conveyance of the equity of redemption contains a clause by which the grantee assumed and agreed to pay the mortgage debt.

From the foregoing it is clear that it was Stephenson's duty, not only on general principles of equity, but under the covenant in his deed, to pay the taxes represented by the tax certificate upon which the tax deed in question was issued, and to pay all taxes on the property during the life of the mortgage. Now it stands as a verity in this case that the appellant was, really, equally interested with Stephenson in the equity of redemption; that to the extent of the necessary expenditures for taxes, it was the sole beneficiary of the interest which he acquired under the deed from the mortgagors. Stephenson was a mere trustee of the title for

the sole use and benefit of the appellant, till reimbursed for all expenditures incurred by it in carrying out the joint enterprise; and upon the tax deed being taken, appellant became, at most, as between the parties, the owner of the property subject to the plaintiff's mortgage, if the scheme were carried out as agreed upon, for it does not appear to have been contemplated that plaintiff should be prejudiced by the speculation that was going on between the trust company and Stephenson and Upham, till long after the tax deed was taken. Not till the depreciation in the value of the property destroyed the prospect of profits in the enterprise and jeopardized the prospect of recovering the money expended by appellant and his associates as well, did it occur to them to insist upon the tax claim as a lien paramount to the plaintiff's mortgage. Therefore, no reason is perceived why the trust company should not be considered in equity bound, as one of the owners of the equity of redemption, to pay the tax the same as if such equity had been actually vested in it. It occupied no better position merely because the title was placed in the name of another for its use. The fact that the agreement for the speculation was verbal, and voidable under the statute of frauds on that account at the option of either party to the enterprise, does not affect the question. Appellant, while in duty bound to protect the plaintiff's interest in the land, made the arrangement detailed, to acquire title to the property, ostensibly without prejudice to plaintiff's rights. It kept silent as to all the operations when honesty required it to speak, if plaintiff's rights were in any way in jeopardy, and thereby it is estopped from now changing its position to plaintiff's prejudice.

There is no principle better established in equity than that the statute of frauds cannot be invoked to enable the party who relies upon it to perpetrate fraud. In short, courts of equity will not sanction the use of the statute of frauds as an instrument of fraud. 2 Pomeroy, Eq. Jur.

§ 921. Here the trust company, as stated, was as much interested as Stephenson in the title acquired by him, and, in order to realize on their scheme, was as much in duty bound to pay the taxes on the property and to pay the mortgage debt, though it was so circumstanced that it might have withdrawn, no doubt, from the arrangement at any time, unless estopped on some principle of equity. To allow it now, because the scheme miscarried by reason of a depreciation in the value of the property, to change its position to the plaintiff's prejudice, and succeed in recovering the money paid for taxes upon the ground that the contract entered into by it with Stephenson and Upham was void under the statute of frauds, it seems would be using that beneficent statute to perpetrate a fraud. It is not the business of courts of equity to permit that.

It follows from the foregoing that the judgment appealed from must be affirmed.

By the Court.— So ordered.

REED, Respondent, vs. KEITH, Appellant.

99 672
104 334
d104 335

May 7 — May 24, 1898.

Slander: Punitory damages: Excessive damages, when not apportionable: Appeal.

1. In an action for slander, only compensatory damages are recoverable, where there is no proof of actual malice or ill-will, or of facts and circumstances from which they can justly be inferred. They cannot be so inferred from mere proof that the defendant, the commander of a vessel, when the plaintiff, an employee, was leaving the vessel, ordered him never to return, and when asked why. said in the hearing of others, "you stole,— detectives saw you,— I wont have any thieves on board."
2. Upon appeal in an action for slander, where the trial court submitted the question of punitory damages to the jury, and they

returned a verdict for an entire sum which was clearly excessive, and that court, on the plaintiff's remitting a certain sum, ordered judgment for the balance, *held*, that the supreme court would not apportion the sum between compensatory and punitory damages, but there must be a new trial.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The complaint charges that the defendant spoke of and concerning the plaintiff certain defamatory words set out in the opinion. The answer admits that he spoke the words, but alleges that they were directed to the plaintiff, and were spoken without malice. In mitigation of damages, the defendant alleges that he was one of the charterers of the steamer Christopher Columbus, and in control of the boat; the plaintiff was an employee on the boat, in charge of a fruit stand; that it was a part of plaintiff's duty to register every cash sale on a cash register; that other employees on the boat informed defendant that plaintiff made sales that he did not register, which reports defendant believed to be true. The case was tried before a jury, and a verdict for $1,800 was rendered for plaintiff, upon which judgment was entered. Upon motion to set aside the judgment and for a new trial the court made an order that the verdict and judgment be set aside, and a new trial granted, unless within ten days the plaintiff should file "a written *remittitur* of all of said verdict above $500," and, if so filed, the judgment might stand as though entered for said last-mentioned sum. The *remittitur* was filed as directed, and the defendant appeals from the judgment.

For the appellant there was a brief by *Henry J. Jordan*, attorney, and *S. T. & Wm. Harrison*, of counsel, and oral argument by *Mr. Jordan.*

For the respondent there was a brief by *McCausland & Smith*, and oral argument by *E. F. McCausland.*

BARDEEN, J. The verdict of the jury was clearly excessive; so much so as to indicate that they did not consider the rights of the parties with that fairness and candor that should have characterized their deliberations. The trial court seems to have been of that opinion when he required the plaintiff to remit from the verdict the sum of $1,300. But upon what theory he proceeded we are not advised. Whether he was of opinion that the evidence failed to show such circumstances of malice and ill-will as to warrant punitory damages, or whether he felt that the verdict was simply excessive and ought not to stand, admitting that punitory damages were permissible, we are unable to determine.

A careful review of the whole case leads us to the conclusion that the evidence returned fails to show a case where punitory damages should have been allowed. The plaintiff testified: "I frequently met *Capt. Keith* while I had charge of the officers' dining room." "He always treated me well; never had a word from him; were always on good terms." "The captain was always gentlemanly toward me, as far as I could observe." "The captain never had any trouble with me of any kind. He had no grudge against me that I am aware of." This was after he had been discharged for the alleged shortcomings at the fruit stand, and during his second employment on the boat. His second employment ran from August 26 to September 17, 1895. The circumstances under which the alleged defamatory words were used are detailed by the plaintiff as follows: "I was about to come ashore,—was stepping on the gang plank, walking down a little way,—when some one tapped me on the shoulder. I looked around, and saw it was *Capt. Keith*. He says, 'You are going ashore now?' I said, 'Yes.' He said, 'Well, never put your foot on this boat while I am on it.' I said, 'Why?' He said, 'You stole; a detective saw you six times; and never put a foot on the boat again while I am on it, as I won't have

any thieves on board.' He turned around, and walked away onto the boat." He further says that defendant spoke "harshly" and "spitefully," and the words were spoken in the presence of several waiters on the boat.

We must assume that the plaintiff stated his case as strongly as the facts would warrant. The other facts in the case fail entirely to give any more sinister character to the situation than is inferable from the statement made by plaintiff. No special circumstances of insult or aggravation were alleged or proven. While it is true that malice may be inferred from the utterance of slanderous words (*Brueshaber v. Hertling*, 78 Wis. 498), not every slander will justify the jury in awarding punitory damages. While, perhaps, stating the rule quite strongly, LYON, J., in *Templeton v. Graves*, 59 Wis. 95, says: "Punitory damages can only be properly awarded in an action for slander when it is made to appear that in speaking the slanderous words the defendant was prompted thereto by special ill-will, bad intent, or malevolence towards the plaintiff; that is to say, express malice of the defendant must be proved, or the recovery should be limited to compensation alone. Such malice may be inferred from all the circumstances of the case; indeed, it would ordinarily be very difficult to prove its existence by direct evidence. But it is not to be inferred from the facts alone that the words are false, and injurious to the plaintiff, although malice is implied from those facts." In absence of proof of express malice, or of facts and circumstances from which malice is justly inferable, the recovery must be limited to compensatory damages, or such as would be a fair recompense for injury to plaintiff's feelings, to his reputation, etc. This reparation the law will compel the offender to make, but he cannot be punished beyond the rule as stated.

The trial court submitted to the jury the question of awarding punitory damages, and the result shows that they

went beyond any reasonable limit. Our review of the evidence leads to the conclusion that the case is barren of any evidence that would warrant the jury in giving an exemplary recovery. There are certainly no circumstances of aggravation or insult; no facts that indicate special ill-will or malevolence of defendant towards plaintiff to the extent that he should be punished therefor. While the jury must have a large discretion in fixing compensatory damages, where, as in this case, the recovery is bunched in one sum, we do not feel at liberty to usurp their province, and say how much should be allowed under either head. We call attention to the suggestion of Chief Justice CASSODAY in his opinion in *Eviston v. Cramer*, 57 Wis. 570, that the better practice would be, in cases where both compensatory and punitory damages are claimed, to have the jury make separate findings of the amounts allowed. This might save prolonging litigation where the punitory recovery is disallowed. Under the circumstances, we cannot say that the plaintiff's damages are $500, or any other sum, without putting ourselves in the light of jurors. This we do not feel at liberty to do, but must send the case back for a new trial.

By the Court.—The judgment of the superior court of Douglas county is reversed, and the cause is remanded for a new trial.

SPENCE, Respondent, vs. RAMBUSCH, Executrix, Appellant.

May 7—May 24, 1898.

Execution: Exemption of abstract books.

It is a condition precedent to the exemption from execution of abstract books, maps, etc., under subd. 13, sec. 2982, R. S. 1878, that they be "kept or used" by the debtor for the purpose of making abstracts of title to land at the time of the levy. The exemption is personal to the debtor, and is abandoned and lost if, before the seizure, he absconds from the state, with intent to avoid service of process and without intent to return.

APPEAL from an order of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

This is an appeal from an order of the circuit court for Jefferson county denying the motion of the defendant that the sheriff of Dodge county be directed to deliver to her, as executrix of the will of William T. Rambusch, deceased, certain property taken on a writ of attachment issued against said Rambusch in his lifetime in favor of the plaintiff, and claimed by the defendant to have been exempt from attachment. The writ of attachment and summons were served upon William T. Rambusch on the 12th of October, 1896, by leaving copies thereof at his usual place of abode in Dodge county, in the presence of the defendant, *Emily Rambusch*, his wife, the said William T. Rambusch not being found; and the ground of the attachment, as stated in the affidavit, was that William T. Rambusch had absconded from the state, to the injury of his creditors; that he had disposed of his property with intent to defraud his creditors; and that he had fraudulently contracted the debt upon which the action was brought.

The property in suit consists of books, maps, plats, and other papers formerly kept or used by Rambusch for the purpose of making abstracts of title to land, and its description brings it within the language of subd. 13, sec. 2982, R. S. 1878, "of property exempt from execution." The motion was based upon an affidavit of the defendant tending to show that the property was kept and used by Rambusch for the purpose of making abstracts of titles to land in Dodge county; that, subsequent to the levying of the attachment, Rambusch died, testate, and that she was the executrix under his will; that she and Rambusch, her husband, had lived in the city of Juneau, in Dodge county, continuously for twenty years prior to his death, and their actual residence was in that county during all said time; that the property was exempt; and that the sheriff refused to deliver it up, upon demand. This affidavit was traversed by an affidavit of the

plaintiff, in which she denied that Rambusch was an actual resident of the state at the time that the attachment was levied, or that the property in question was kept or used by him for the purpose of making abstracts of title, and alleged that on or about October 10, 1896, he absconded from the state without intention of returning, and remained without the state until his death by his own hand, at or near Fredericksburg, Virginia, about October 18, 1896; and that, for many years prior to absconding, said Rambusch had been guilty of a great number of forgeries and fraudulent alterations of notes and mortgages upon which he had procured money to the amount of over $100,000, which he had appropriated to himself, and was unable to restore or repay, and had thereupon, to avoid criminal prosecution, fled from the state, and had thereafter taken his own life. She further alleged that no demand had ever been made by Rambusch for said property, nor had he ever claimed it as exempt.

Upon the motion, certain issues were framed by the court for trial, and evidence was introduced upon the said issues by both parties, which issues and the findings of the court thereon are as follows: "Did the original defendant, William T. Rambusch, deceased, shortly prior to the levy of the attachment herein, abscond from the state, and did he remain without the state until his death by his own hand, on the 20th day of October, 1896? He did. Were the books, plats, abstracts, and other papers and documents included in the defendant's motion for release of property from the attachment, at the time of the levy of the attachment herein, actually kept or used by William T. Rambusch, deceased, for the purpose of making abstracts of title to land? They were not. Did William T. Rambusch, deceased, the defendant in the original action, at the time of the levy of the writ of attachment herein on the 12th day of October, 1896, have an actual residence in this state, within the meaning of the exemption laws thereof? He did not. When the original defendant, William T. Rambusch, left the state of Wiscon-

sin, on the 10th day of October, 1896, did he do so with the intent of returning to the state of Wisconsin, and continuing his residence therein? He did not. When the original defendant, William T. Rambusch, left the state of Wisconsin, on the 10th day of October, 1896, did he do so with the intent of abandoning his residence in the state of Wisconsin, and permanently remaining away from the same? He did."

Upon these findings, the defendant's motion to discharge and release the attachment was denied, and from this order the defendant appeals.

Harlow Pease, for the appellant, argued, *inter alia*, that statutes of exemption are to be liberally construed, for the purpose of securing the debtor's family against want and distress. *Maxwell v. Reed*, 7 Wis. 582; *Connaughton v. Sands*, 32 id. 387; *Kuntz v. Kinney*, 33 id. 510; *Heath v. Keyes*, 35 id. 668; *Krueger v. Pierce*, 37 id. 269; *Russell v. Lennon*, 39 id. 570, 573; *O'Gorman v. Fink*, 57 id. 649, 651; *Hiles v. Milwaukee P. & L. Co.* 85 id. 90, 92; *Kapernick v. Louk*, 90 id. 232, 234. The benefit of those laws cannot be waived even by express terms in a warrant of attorney, and the exemption is not a mere personal privilege of the debtor. *Comstock v. Bechtel*, 63 Wis. 656.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence*.

WINSLOW, J. The facts found by the circuit judge are amply supported by the evidence. The situation then was this: Rambusch, on the 10th of October, owned and used a set of abstract books. He was an embezzler to a large amount, and discovery was imminent, and he knew it. On that day he left his home, stating that he was going to Beaver Dam, but went instead to Minnesota Junction, and took a train, and disappeared from public view, and was not heard from again by the public until the 20th day of October, when he committed suicide at Fredericksburg, Virginia. His abstract office and books were in charge of a clerk, and,

on the 12th day of October, the office was open, and the books were used by the clerk in making abstracts. On that same day, the plaintiff, who was a creditor of Rambusch to a large amount, commenced her action, and caused the books to be attached; and the sole question is whether the books were exempt from seizure upon that day.

The statute (R. S. 1878, sec. 2982, subd. 13) provides that "all books, maps, plats and other papers, *kept or used by any person* for the purpose of making abstracts of title to land," shall be exempt from seizure or sale on execution. The sole question which we deem it necessary to consider is whether the abstract books and papers in question were "kept or used" by Mr. Rambusch on the 12th day of October, when the attachment was levied. We think it is clear that this question must be answered in the negative. The circumstances under which he left home, on the 10th of October, render it morally certain that he had no intention of returning. He was, beyond doubt, on the 12th of October, a fugitive from justice, and had abandoned his home and his business. No other conclusion could be drawn from the evidence. We are unable to see how it can be said that a person either keeps or uses property which he has deliberately left behind him under such circumstances; and it is a condition precedent to the exemption under the clause in question that the property be "kept or used" by the debtor at the time of the levy. This is not an exemption reserved to the debtor and his family, but to the debtor alone, and only while he keeps or uses it. It is true that the exemption laws are liberally construed, so as to effect their beneficent purpose; but it is equally true that a personal exemption of this nature may be effectually abandoned, and it has been frequently held that absconding from the state with intent to avoid service of process and all responsibility to its laws constitutes such an abandonment. *Orr v. Box*, 22 Minn. 487; *Betz v. Brenner*, 106 Mich. 87.

By the Court.— Order affirmed.

INDEX.

ABANDONMENT.
Of exemption. See EXECUTIONS.
Of wife. See JURISDICTION, 2.

ABATEMENT OF ACTION.

See PLEADING, 1.

1. The right of action given by secs. 4255, 4256, R. S. 1878, to certain beneficiaries therein named is personal, and the damages are limited to a mere indemnity for the pecuniary injury resulting therefrom to such beneficiary, and the action therefor does not survive the death of such beneficiary, but abates upon his death and cannot be revived in favor of his administrator. *Schmidt v. Menasha Woodenware Co.* 300
2. The right of a widow under that statute is not a vested property right and does not survive to her heirs under sec. 4253, R. S. 1878. *Ibid.*

ABSTRACT BOOKS. See EXECUTIONS.

ACCIDENT INSURANCE. See INSURANCE, 1-9.

ACCOUNTING. See ESTATES OF DECEDENTS.

ACTION.

Cause of action. See ABATEMENT. ATTACHMENT, 1, 2. CLOUD ON TITLE, 1, 3, 4. DEBTOR AND CREDITOR. EASEMENT, 5. EJECTMENT. EQUITY, 1, 2. ESTATES OF DECEDENTS, 5. FRAUD, 1, 2. FRAUDULENT CONVEYANCES, 6. LIBEL. MANDAMUS, 2. MASTER AND SERVANT. NEGLIGENCE, 10, 11. RAILROADS, 2-4.

Abatement and survival. See ABATEMENT.

By and against whom. See CLOUD ON TITLE, 1, 2. DEBTOR AND CREDITOR. ESTATES OF DECEDENTS, 7.

At law or in equity? See CLOUD ON TITLE, 1, 3, 4. EQUITY. INJUNCTIONS, 4.

Joinder. See CLOUD ON TITLE, 3. PLEADING, 8, 9.

ADVERSE POSSESSION. See EASEMENTS, 1-3. STATUTE OF LIMITATIONS, 2.

AGENCY.

See CORPORATIONS, 1. FRAUD, 1-3, 8. INSURANCE, 14. MECHANICS' LIENS, 1.

1. Where the pastor of a church, acting as its agent, though without authority, made a written contract for the repair and remodeling of the church building, and superintended the work, and the members and trustees of the church corporation, with full knowledge

of the facts, made no objection to his acts, but subsequently approved thereof by partly paying for such improvements and accepting and using the building, *held*, that his contract must be regarded as effectually ratified. *Moody & Meckelburg Co. v. Trustees of M. E. Church*, 49

2. The pastor, not being a trustee, does not, by merely acting as such agent, incur any personal liability. *Ibid.*

3. Plaintiff's agent, in duty bound to care for his mortgage securities agreed with another to purchase a tax certificate on certain of the mortgaged lands, take a tax deed thereon, by judicial proceedings quiet title thereto as to all persons but plaintiff, such other to obtain a deed from the mortgagor, take possession of the lands and collect the rents in the meantime for such agent's use, and then that the property should be sold, plaintiff's mortgage be paid, such agent be reimbursed for his expenditures not covered by rents received, and the balance be divided between the parties to the enterprise. The agreement was made and carried out without knowledge of plaintiff, up to and inclusive of perfecting the title under the tax deed, such other taking the deed from the mortgagor, with a covenant therein to pay the mortgage debt. In the meantime the value of the property depreciated so as to be inadequate to secure plaintiff's debt. Upon plaintiff's discovering the facts, action was brought to vacate the tax deed, and the agent defended upon the theory, only, that he possessed a lien for taxes, merged in the deed, paramount to the principal's lien under his mortgage. *Held:*

(1) That the rule, that an agent cannot speculate with property of the principal under his charge, to the prejudice of the principal, renders voidable a tax deed obtained by such agent, of such property, which is satisfied in equity, however, by requiring the principal, as terms of avoiding such deed, to reimburse the agent for the expenditures necessary to protect such principal's interest in the land, with interest thereon.

(2) That the rule requiring such reimbursement does not apply where the agent is in receipt of rents from the property sufficient to pay the taxes, nor in any case, unless the agent, by a proper showing, places the court in a position to do complete equity by its decree.

(3) That where the plaintiff shows the existence of the relation rendering the taking of the tax deed wrongful, circumstances calling for terms of setting it aside, under the rule stated, are purely defensive, and unless made to appear, the judgment should go absolutely.

(4) That when a person, so circumstanced as to be in duty bound to pay the taxes, purchases a tax certificate or takes a tax deed, it operates as a redemption from the taxes and gives such purchaser no right to a lien to recover his expenditures.

(5) That it is the duty of a person, in possession under a deed conveying to him an equity of redemption from a mortgage, to pay the taxes on the property, and if the possession and title are held in trust for the grantee and another, both are bound to pay the taxes as between them and the mortgagee of the property, so that the purchase of a tax certificate on the property by either operates as a redemption from the tax.

(6) That the fact that the agreement between the person in possession and holding the title and such other is verbal and void under the statute of frauds, cannot be invoked by either in defense of a claim under the tax certificate or tax deed, under the

rule that courts of equity will not permit the use of the statute of frauds to commit a fraud.

(7) That an agreement, stated in the foregoing, having been made and partially carried out without the knowledge of plaintiff, on the theory that his interests were not to be imperiled, the agent became thereby estopped from changing his position in that regard to plaintiff's prejudice. *Dana v. Duluth Trust Co.* 663

ALIMONY. See DIVORCE.

AMENDMENT. See APPEAL, 13, 28. GARNISHMENT, 5. PLEADING, 4.

ANIMALS: Killing. See APPEAL, 23. HIGHWAYS, 4.

APPEAL TO SUPREME COURT.

See DIVORCE, 1. ESTATES OF DECEDENTS, 3–5. EXCISE. FRAUDULENT CONVEYANCES, 3. INSTRUCTIONS. INSURANCE, 6. PLEADING, 4. PRACTICE, 4. WAIVER, 1, 2.

What appealable.

1. That part of a judgment for the foreclosure of a mortgage which orders a judgment for a deficiency is an integral part of the judgment and is appealable. *Kane v. Williams,* 65

2. An appeal from a judgment in an action of ejectment dismissing the complaint for failure of the plaintiff to pay the costs of a continuance, which were less than $100, cannot be sustained, under ch. 183, Laws of 1897, as one in which the title to lands is in question. It involves no consideration of the merits of the case, and the court may determine that question on a motion to dismiss. *Ellis v. Lampman,* 81

3. An order by the court, refusing to vacate a previous order made by a court commissioner in a proceeding under sec. 4096, R. S. 1878, that the defendant produce certain books and papers, and regulating the examination of such books and papers, is neither an interlocutory nor a final order, nor one refusing, continuing, or modifying a provisional remedy, and it is not appealable under sec. 3069, R. S. 1878, as amended by ch. 380, Laws of 1897. *Knowles v. Rogers,* 231

Certificate of judge.

4. In making a certificate to enable a party to appeal to this court from a judgment of less than $100 exclusive of costs, the law contemplates that the trial judge shall act judicially and with some degree of discretion, and not in a mere perfunctory way to sign a certificate to enable a party to appeal where no disputable question of law is involved. *Rosenow v. Gardner,* 358

5. Under ch. 215, Laws of 1895, as amended, if a judgment for less than $100 without costs is rendered in plaintiff's favor, and the only question in controversy is as to whether defendant is entitled to costs, he may appeal from the judgment to test that question if the trial judge certifies the facts and that the case involves some question of law, specifying it, of such doubt and difficulty as to require the decision of the supreme court. *Field v. City of Elroy,* 412

Notice of appeal.

6. The "adverse party," upon whom notice of appeal is to be served in a foreclosure case, is one who has an interest adverse to the reversal of the matter appealed from. The purchaser at the foreclosure

sale, whose title has become absolute by confirmation of the sale, if a stranger to the record, has no such adverse interest and is not an "adverse party" within the meaning of sec. 3049, R. S. 1878. *Crowns v. Forest Land Co.* 103

7. Were such purchaser to be deemed an adverse party, the fact that the motion to dismiss the appeal because notice was not served on such purchaser was made by a party to the record on his own account and not on behalf of the purchaser, would be sufficient reason for denying the motion. *Ibid.*

8. B. assigned to E. a judgment owned by him, in trust to pay his indebtedness to E. and to some other creditors. E. commenced a creditor's action, making B. and the debtor in such judgment and others parties defendant. A receiver appointed in that action sued H. and others to foreclose a mortgage acquired by him as such receiver, making B. a party. Orders were afterward made in both actions ratifying the report of the receiver and discharging him and his bondsmen. *Held*, that B. could not, by a notice of appeal entitled in the creditor's action, appeal from both orders, but the appeal in the action against H. must be dismissed. *Bragg v. Blewett*, 348

9. In the creditor's action brought by E. the defendant B. suffered judgment by default, and the suit was afterward settled between the plaintiff and the only defendant having any interest therein, and the report of the receiver who carried the settlement into effect was approved, and he and his bondsmen discharged. *Held*, that the defendant B. was not "aggrieved" within the meaning of sec. 3048, R. S. 1878, and could not appeal from the order. *Ibid.*

Waiver of appeal.

10. A party who is, by a judgment, absolutely entitled to a sum of money does not, by accepting that money, waive or become estopped from prosecuting an appeal which does not involve a reversal of that part of the judgment under which he takes the money. *Fiedler v. Howard*, 388

11. A plaintiff in an action involving rights to a certain fund cannot avail himself of the objection to defendant's appeal therein that the latter has accepted the fruit of the judgment in her favor, when he himself has, by objecting to the settlement of a bill of exceptions by her, compelled her to file a bond securing the disposition of the fund as may be determined on the appeal, and has thus, in effect, secured the fruits of the judgment, and has appealed. *Ibid.*

Return on appeal.

12. The failure of the clerk of the trial court, upon an appeal from an order, to transmit the original papers (or copies) used by each party on the motion, and to certify them to be such original papers or copies, as required by sec. 3050, R. S. 1878, or of the order to refer to all records and papers read or used by either party on the motion, as required by Circuit Court Rule XI, sec. 6, renders the appeal subject to be dismissed. *Tenney v. City of Madison*, 539

13. The accidental omission from an undertaking on appeal, conditioned for the payment of all costs and damages which may be awarded on the appeal and all which may be sustained by reason of the continuance of a temporary injunction, of the penal sum required by the terms of the order, may, under the provisions of sec. 3068, R. S. 1878, be cured upon motion in the supreme court, by the filing of a proper undertaking. *Ibid.*

14. The plaintiff's right, under sec. 3061, R. S. 1878, to a continuance of an injunction until the decision of the appeal, does not become absolute and irrevocable upon his giving the required undertaking, but is subject to the right of the respondent, at any time pending the appeal, to file an undertaking to abide and perform any final judgment which may be rendered in favor of the appellant in such action: but a failure of the order to give the respondent that privilege may be corrected in the supreme court. *Ibid.*

Brief on appeal.

15. A brief in a case depending upon the evidence should, under Supreme Court Rule IX, merely state the leading facts and conclusions which the evidence establishes or tends to establish, with reference to the names of the witnesses and the places in the printed case where the evidence may be found. *Milwaukee Cold Storage Co. v. Dexter,* 214

16. Unless the brief of the appellant contains, among other things, a concise statement of "the errors relied upon for reversal," as required by Supreme Court Bule IX, the court cannot review errors not so specified. *Weyerhaeuser v. Earley,* 445

Questions considered on appeal.

17. In order that the competency of a document, which was offered in evidence at the trial and excluded, may be determined on appeal, it must be brought into the record. *Slauson v. Goodrich Transportation Co.* 20

18. The objection that there was no finding as to a conspiracy between the defendants to defraud the plaintiffs will not avail on appeal, where the party objecting did not ask for such a finding, nor save an exception to the failure of the court to submit that question. *Limited Investment Asso. v. Glendale Investment Asso.* 54

19. Ordinances of a municipal corporation which are not mentioned in the pleadings nor introduced in evidence will not be considered on appeal. *Stittgen v. Rundle,* 78

20. On appeal, the court will not consider the question of excessive damages, if the bill of exceptions is not certified to contain all the evidence, and there was no motion for a new trial on that ground. *Collins v. City of Janesville,* 464

21. An order of court, dissolving an injunction by which the enforcement of a foreign judgment was restrained pending proceedings for the discharge of the defendant as an insolvent debtor, cannot be reviewed on appeal if the record contains neither the evidence nor the pleadings and papers on which such order was based. *Guldemann v. Lerdall,* 495

22. A plaintiff who has brought a suit in equity cannot, on appeal by her, raise the objection that the defendants' answer contests her title, and the action should have been at law. *Ellis v. Allen,* 598

23. In an action against a railroad company for the loss of an animal on its track, alleged to have been caused by its failure to maintain cattle guards at a highway crossing, which was tried wholly upon the issue of highway or no highway, the plaintiff cannot, for the first time on appeal, claim to recover on the ground that the defendant failed to fence its track at that point. *Hunter v. C., St. P., M. & O. R. Co.* 613

24. A defendant, who was personally served with the summons and complaint in an action to foreclose a mortgage, but did not ap-

pear therein nor raise the objection that the complaint did not state facts sufficient to constitute a cause of action against him for personal liability for any deficiency, cannot raise that objection on appeal from a judgment for deficiency rendered against him by default, and from an order denying a motion to set aside such judgment, especially where the complaint is sufficient to inform such defendant that the plaintiff claims that he is liable and that judgment for deficiency will be taken against him. *Richards v. Land & River Imp. Co.* 625

25. Neither can that objection be raised on appeal from a judgment for deficiency and an order denying his motion, made at a subsequent term, to set the same aside, by a defendant who was, by the original judgment of foreclosure, declared to be personally liable for any deficiency, where such original judgment has not been appealed from, he being bound thereby. *Ibid.*

Findings, when disturbed on appeal.

26. In a case tried by the court, its finding will not be disturbed on appeal if not clearly against the weight of the evidence. *Murphy v. Quinn,* 466

27. The decision of the trial court upon questions of fact cannot be disturbed on appeal unless contrary to the clear preponderance of the evidence. *B. Hoffmann Mfg. Co. v. Western Stove & Mfg. Co.* 53

28. A defendant in a foreclosure action who neither preserves any exceptions nor perfects any bill of exceptions, but bases his appeal entirely on the record, cannot, on such appeal, take any advantage of the failure of the complaint to state facts entitling the plaintiff to a reformation of a discharge of the mortgage. Where, in such a case, the judgment is sustained by the findings, it will be conclusively presumed that such findings were based on sufficient and competent evidence, and that, if necessary, the pleadings were properly amended. *Kane v. Williams,* 65

29. The ruling of the trial court in refusing to set aside a verdict as not being warranted by the evidence cannot be disturbed on appeal if there is any credible evidence to support it. *Parlin & Orendorff Co. v. Angell,* 297

30. The refusal of the trial court to set aside a verdict for want of evidence and grant a new trial will not be disturbed on appeal if there was credible evidence to support such verdict. *Warder, Bushnell & Glessner Co. v. Angell,* 298

31. The supreme court will not review the finding of a trial court, unless the evidence upon which it is based has been incorporated in the bill of exceptions. *Weyerhaeuser v. Earley,* 445

32. The admission of leading questions is so largely in the discretion of the trial judge that the appellate court will not interfere except in a case of manifest abuse of discretion. *Kohler v. West Side R. Co.* 33

33. Upon the trial of a question of fact by the court without a jury, a nonsuit is never proper under our practice; and yet if, on appeal in such a case, it appears that the plaintiff entirely failed to show any legal demand against the defendant, the judgment of nonsuit will be affirmed. *Yahr v. Joint School Dist.* 281

34. Where the trial court decides there is no evidence to warrant a verdict in plaintiff's favor, and grants a nonsuit or directs a verdict accordingly, the decision will not be disturbed on appeal un-

less it clearly appears by the record to be wrong. *Dewey v. C., M. & St. P. R. Co.* 455

35. Where two causes of action are stated in the complaint, it is within the discretion of the court to require the plaintiff to elect under which cause he will proceed, and its ruling will not be disturbed on appeal except in case of an abuse of such discretion. *Phillips v. Carver,* 561

36. Where there is some evidence tending to support the findings of the jury, the decision of the trial court refusing to set aside the verdict as contrary to the evidence cannot be disturbed on appeal. *Ray v. Lake Superior T. & T. R. Co.* 617

37. The fact that, in a verdict for damages for personal injuries, future loss is found separate from past loss, does not constitute error. *Ibid.*

38. In order to justify the supreme court in setting aside the findings of the trial court upon questions of fact, the evidence must clearly show that they are wrong. *McFarlane v. Louden,* 620

39. On appeal, where the only questions are whether the findings of fact are correct upon the evidence, the judgment will not be disturbed unless the preponderance of evidence is clearly against such findings. *Huguier v. Lord,* 650

Harmless errors.

40. To overrule the challenge for cause of a juror is not prejudicial error, unless it appears that an objectionable juror was forced upon the party after such party had exhausted his peremptory challenges. *Kohler v. West Side R. Co.* 33

41. Where, in an action for personal injuries, the evidence as to the nature and character of the plaintiff's injuries was undisputed, and the judge had charged the jury that, in estimating damages, they should make allowance for the pain and suffering the plaintiff was reasonably certain to endure thereafter from the deformity of his leg and the depreciation of his capacity to earn a livelihood in the future, *held,* that it was not error to refuse to require the jury to make a special finding as to whether the plaintiff's injury was permanent. That would have no bearing except upon the amount of his recovery. *Ibid.*

42. In cases where special verdicts are submitted, the law does not contemplate, nor does proper practice require the court to give, instructions as to the general duty or liability of parties, but the instructions should be directed to the specific questions asked. *Ibid.*

43. An instruction that street railways are responsible for the negligence of their agents in the management of their cars "if any injury accrues therefrom and the passengers themselves are without fault," if objectionable standing by itself, will be rendered harmless if full and correct instructions are also given as to the duty of passengers. *Ibid.*

44. A special verdict to the effect that the conductor of the car was guilty of negligence which was the proximate cause of the injury, and (upon evidence supporting it) that the plaintiff was guilty of negligence which proximately contributed to the injury sustained, which has been passed upon by the trial court, *held* not to be inconsistent and will not be disturbed on appeal. *Ibid.*

45. An instruction that, to enable the jury to answer the questions submitted to them correctly, they might take into consideration the

allegations of the complaint that there was an agreement between the defendants to defraud the plaintiff, is not objectionable, where it is evident, taking it in connection with the whole charge, that what the court intended was that they might do so to determine in what manner it was charged that such agreement had been made. *Limited Investment Asso. v. Glendale Investment Asso.* 54

46. The plaintiff, when being cross-examined by defendant's counsel, was proceeding to make some statement not called for, and such counsel interrupted him, insisting upon a direct answer to his question, and said to the witness in the presence of the jury, "You are not the innocent Abigail you pretend to be," adding, "I can tell about the old man for a good many years, . . . that party is not an innocent party in court." *Held* that, though such remarks were highly improper and out of order, yet they were not a sufficient cause for reversing a judgment for the defendant. *Knopke v. Germantown F. M. Ins. Co.* 289

47. Upon the trial of the issue whether the plaintiff intentionally set fire to the buildings insured by the policy sued on, *held*, that a question asked of the plaintiff, for the avowed purpose of showing absence of motive to set such fire, as to whether he lost any money in the building, was properly excluded, in the absence of an offer or attempt to show that any such considerable sum as might affect his motives was lost there. *Ibid.*

48. An appellant who voluntarily brought improper evidence into a case cannot urge the admission thereof as ground of error. *Ibid.*

49. Where the defense set up in an action upon an insurance policy was that the plaintiff intentionally set fire to the insured premises, the court instructed the jury to the effect that the presumption of innocence existed until the jury were satisfied by the preponderance of evidence of the plaintiff's guilt, and repeated several times that the case was to be decided upon the preponderance of evidence, which he defined as that which weighs most. *Held*, that it was not error to refuse to add to such instruction that "there is no preponderance unless the testimony adduced is sufficient to overcome the presumption of innocence." *Ibid.*

50. Where, in an action upon an account stated, the question whether there was an account stated was submitted to the jury and was found by them in the affirmative, and the plaintiff's recovery was wholly based thereon, *held* that the admission of evidence of an open account from which the statement was made up, if error at all, was not prejudicial, nor ground for reversal. *Warder, Bushnell & Glessner Co. v. Angell,* 298

51. To allow counsel, in argument, to call the attention of the jury to the fact that his client was the principal witness in his own behalf and that the adverse party had not called witnesses to impeach his character for truth and veracity is not erroneous. *Bleiler v. Moore,* 486

52. To define "proximate cause" in a charge to the jury as "a moving cause, or an immediate or direct cause to the remote cause," is error. *Schneider v. C., M. & St. P. R. Co.* 378

Practice.

53. Upon appeal in an action for slander, where the trial court submitted the question of punitory damages to the jury, and they returned a verdict for an entire sum which was clearly excessive, and that court, on the plaintiff's remitting a certain sum, ordered

judgment for the balance, *held*, that the supreme court would not apportion the sum between compensatory and punitory damages, but there must be a new trial. *Reed v. Keith*, 672

54. Where an order sustaining a demurrer to the complaint and awarding costs is reversed on appeal, another order setting off those costs against costs awarded to the plaintiff on dismissal of the defendant's counterclaim should also be reversed. *Winkler v. Racine Wagon & Carriage Co.* 184

55. If, when a cause is reached for argument in the supreme court, it is submitted or represented by the respondent by counsel, and is not so submitted or represented by the appellant, the judgment will, under Rule XVII, be affirmed. *Perkins v. Jacobs*, 409

56. Where it appears on appeal that from the commencement of the action until that time the defendant has pursued a policy of delay for the mere purpose of delay, and has neither settled any bill of exceptions nor made any record to present to the court for review, he may properly, under sec. 2951, R. S. 1878, be punished by the addition of damages to the judgment, on affirmance, besides costs and interest. Ten per cent. damages added in this case. *Ibid.*

APPEALABLE ORDER. See APPEAL, 3.

APPORTIONMENT of damages. See APPEAL, 41, 53.

ARGUMENTS TO JURY: Improper remarks. See APPEAL, 46, 51.

ARREST without warrant. See CRIMINAL LAW, 1.

ASSESSMENTS.
For local improvements. See MUNICIPAL CORPORATIONS, 1–6.
To pay death losses. See INSURANCE, 10.

ASSIGNMENT.
For benefit of creditors. See VOLUNTARY ASSIGNMENT.
Of note and mortgage. See GUARANTY. MORTGAGES.

ASSUMPTION of risk. See NEGLIGENCE, 5, 7.

ATTACHMENT.

See CORPORATIONS, 3. EVIDENCE, 2. INSOLVENCY.

1. An affidavit for an attachment in an action to recover a debt not yet due is fatally defective if it fails to state, as required by sec. 2731, S. & B. Ann. Stats., that "the debt is to become due." *Lederer v. Rosenthal*, 235

2. An attachment in an action upon a debt not yet due is authorized by statute only on the conditions that the requisite affidavit be made, and that an undertaking be given in three times the amount demanded by the plaintiff. *Ibid.*

3. Mere nonresidence of the defendant is not a ground for an attachment in an action for a debt not yet due. *Ibid.*

4. An attaching creditor cannot, by disaffirming an express contract for the sale of goods on sixty days' credit on the ground that it was induced by the false representations of the defendant, waiving the tort into which his claim is thus converted and suing on an implied contract for money due, evade the provisions of sec. 2731, S. & B. Ann. Stats., requiring the attachment bond, in a case where the debt is not due, to be in three times the amount demanded. *Ibid.*

ATTORNEY: Improper remarks on trial. See APPEAL, 46.

ATTORNEY AND CLIENT.

1. A mortgagee's attorney, having obtained a judgment of foreclosure, had his own brother appointed referee to make the sale, and caused the land to be bid off in the name of his own sister, the plaintiff in this action, and the mortgagee, as joint purchasers, by that means attempting to secure for himself a half interest in property worth $1,700 on account of his claim for services amounting to less than $200. The sister had no interest in the mortgage and paid no money on the sale, but she claimed that the attorney had assigned his claim to her in payment for housekeeping, and it appeared that before the sale the attorney had sold the same claim to a third party, who, after the foreclosure sale, purchased the property from the mortgagee. In an action by the sister for partition, *held*, that the transaction was fraudulent. *Ellis v. Allen*, 598

2. An attorney, on foreclosing a mortgage, even if entitled to a lien for his services, is not thereby entitled to bid off the property at the sale in the name of another to preserve such lien; nor, even though the mortgagee may have consented that it be bid off in their joint names, which would give them interests in proportion to the amount invested by them respectively, is he authorized to substitute his sister in place of himself, so that she could claim a half interest. *Ibid.*

BANKS AND BANKING.

See CONSTITUTIONAL LAW, 8. COUNTY BOARDS (6).

1. The cashier of a going bank may lawfully, acting in good faith and with the consent of the stockholders and directors, borrow money from such bank with which to buy land, and no trust in the land will arise from such transaction in favor of the bank. CASSODAY, C. J., dissents. *Barth v. Koetting*, 242

2. In order to render such a transaction fraudulent as to subsequent creditors of the bank, it must have been entered into with the intent to contract debts in the future and defraud the holders of such debts. CASSODAY, C. J., dissents. *Ibid.*

BILL OF EXCEPTIONS. See APPEAL, 11, 17, 18, 20, 21, 28, 31.

BONDS.
Of assignee. See CONSTITUTIONAL LAW, 7.
Of county. See COUNTIES, 1–3, 7.

BRIDGES. See MANDAMUS, 2.

BRIEFS. See APPEAL, 15, 16.

BURDEN OF PROOF. See MASTER AND SERVANT, 3. PRACTICE, 5.

CASES DISTINGUISHED, ETC.

1. *Butternut v. O'Malley*, 50 Wis. 329 (as to power of county board to rebate judgment), distinguished. *Washburn Co. v. Thompson*, 595

2. *Cook v. Cook*, 56 Wis. 195; *Crugom v. Crugom*, 64 Wis. 253 (as to judgment for alimony), in part overruled. *Bassett v. Bassett*, 344, 346

3. *Crugom v. Crugom*, 64 Wis. 253. See No. 2.

4. *Deery v. McClintock*, 31 Wis. 195 (as to determining legal title in equitable action), distinguished. *Ellis v. Allen*, 603

5. *Dreher v. Fitchburg*, 22 Wis. 675; *Houfe v. Fulton*, 29 Wis. 296 (as to injury from defect in highway), distinguished. *McFarlane v. Sullivan*, 366

6. *Fellows v. Gilhuber*, 82 Wis. 639 (as to liability of lessor of dangerous premises), limited and expressions therein held *obiter*. *Schaefer v. Fond du Lac*, 337

7. *Fisher, In re*, 15 Wis. 511. See No. 16.

8. *Flanders v. Merrimac*, 44 Wis. 621; *Webster-Glover L. & M. Co. v. St. Croix Co.* 71 Wis. 317 (as to waiver of right to appeal), explained. *Fiedler v. Howard*, 397

9. *Follett v. Heath*, 15 Wis. 601 (as to false description), distinguished. *Rock v. Collins*, 637

10. *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345. See No. 23.

11. *Franey v. Warner*, 96 Wis. 222. See No. 23.

12. *Gaston v. Babcock*, 6 Wis. 503; *In re Fisher*, 15 Wis. 511 (as to effect of appeal from county court), distinguished and limited. *Richter v. Leiby*, 515

13. *Hayes v. Douglas Co.* 92 Wis. 429 (as to assessments for street improvements), distinguished. *Hennessy v. Douglas Co.* 129, 131, 137

14. *Hebgen v. Koeffler*, 97 Wis. 313 (as to fraud by promoters), distinguished. *Milwaukee Cold Storage Co. v. Dexter*, 215, 226

15. *Hixon v. Oneida Co.* 82 Wis. 515 (as to waiver of right to appeal), limited. *Fiedler v. Howard*, 398

16. *Hobart v. Milwaukee City R. Co.* 27 Wis. 194 (as to use of street for street railway), distinguished. *Zehren v. Milwaukee Electric R. & L. Co.* 97

17. *Holton v. Burton*, 78 Wis. 321 (as to assignment pending supplementary proceedings), distinguished. *Dahlman v. Greenwood*, 163, 168, 169

18. *Houfe v. Fulton*, 29 Wis. 296. See No. 5.

19. *Kellogg v. Oshkosh*, 14 Wis. 623. See No. 32.

20. *Lynch v. Divan*, 66 Wis. 490 (as to debt of executor), explained and in part disapproved. *Estate of Robinson v. Hodgkin*, 328, 330

21. *Ohlert v. Alderson*, 86 Wis. 433 (as to evidence of fraud), distinguished. *Meloy v. Peterson*, 489, 492

22. *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247 (as to contributory negligence), distinguished. *Schneider v. C., M. & St. P. R. Co.* 378, 386

23. *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; *Fountain Spring P. Co. v. Roberts*, 92 Wis. 345; *Franey v. Warner*, 96 Wis. 222 (as to fraud by promoters), distinguished. *Milwaukee Cold Storage Co. v. Dexter*, 215, 226

24. *Ryan v. Outagamie Co.* 80 Wis. 336 (as to law giving county board power to fix officers' fees), followed. *Wentworth v. Racine Co.* 26, 30

25. *Sexton v. Rhames*, 13 Wis. 99 (as to proof of title), distinguished. *Slauson v. Goodrich Transportation Co.* 23

26. *Smith v. Sherry*, 54 Wis. 114. See No. 27.

27. *State ex rel. Cothren v. Lean*, 9 Wis. 279; *Smith v. Sherry*, 54 Wis. 114 (as to publication of laws, etc.), distinguished. *Wentworth v. Racine Co.* 30

28. *State ex rel. M., T. & W. R. Co. v. Common Council of Tomahawk*, 96 Wis. 73 (as to limitation of municipal indebtedness), in part overruled. *Crogster v. Bayfield Co.* 2, 19

29. *Stein v. Benedict*, 83 Wis. 604 (as to demurrer *ore tenus*), overruled. *Kruczinski v. Neuendorf*, 264, 270

30. *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157 (as to improper remarks by counsel), distinguished. *Knopke v. Germantown F. M. Ins. Co.* 294

31. *Tyson v. Tyson*, 94 Wis. 225 (as to undertaking on appeal), distinguished. *Tenney v. Madison*, 542

32. *Wakeley v. Nicholas*, 16 Wis. 588; *Kellogg v. Oshkosh*, 14 Wis. 623 (as to publication in German newspaper), distinguished. *State ex rel. Goebel v. Chamberlain*, 503, 508

33. *Webster-Glover L. & M. Co. v. St. Croix Co.* 71 Wis. 317. See No. 7.

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

CHATTEL MORTGAGES.

See EVIDENCE, 9. FRAUDULENT CONVEYANCES, 1. VOLUNTARY ASSIGNMENT.

1. One partner has power, in the absence and without the knowledge of his copartner, to execute a chattel mortgage of the partnership property to secure a *bona fide* partnership debt. *Rock v. Collins*, 630

2. Whether or not one partner may, without the consent of his copartner who is accessible for consultation, execute a mortgage of the entire firm property to secure a firm debt, when the effect of such mortgage will be to practically terminate the business of the firm, the subsequent acquiescence or consent of the other partner will remove all question as to the validity of the mortgage. *Ibid.*

3. A chattel mortgage is not rendered void by the fact that the note secured by it is not correctly described therein, if it is so far described that it appears to a reasonable certainty to be the one intended to be secured. *Ibid.*

CITIES. See MUNICIPAL CORPORATIONS.

CLOUD ON TITLE.

See EQUITY, 1, 2.

1. A probate decree, which is void because entered without notice to or the appointment of guardians for the infant heirs of the decedent, and which declares certain adult heirs to be the sole heirs of such decedent, constitutes a cloud upon the title of such infant heirs, and they can maintain an action to recover possession of their interest in the land and to have their title cleared of the clouds raised by such decree and by subsequent conveyances. *Kruczinski v. Neuendorf*, 264, 271

2. One who once held the title under such decree, but has since conveyed all his interest to another, is not a necessary party defendant to the action by such heirs. *Ibid.*

3. Under sec. 2647, R. S. 1878, heirs of a decedent who have been deprived of their interests in his lands when infants by a void decree of a probate court, entered without notice to them or the appoint-

ment of guardians for them, and by subsequent conveyances, may join an equitable action to set aside such decree and conveyances as clouds upon their title, with a legal action to recover possession of their interest in the land, together with rents and profits for the use thereof, since all such causes of action arise out of the same transaction and are connected with the same subject matter. *Ibid.*

4. An action for those purposes is not one for partition, and the complaint need not conform to sec. 3102, R. S. 1878. *Ibid.*

CO-EMPLOYEE. See NEGLIGENCE, 2.

COLLATERAL ATTACK. See GARNISHMENT, 4.

COMPENSATION. See RAILROADS, 2.

COMPROMISE. See COUNTY BOARDS.

CONDITION PRECEDENT. See ATTACHMENT, 2. CONTRACTS, 3. EXECUTIONS. PLEADING, 4. RAILROADS, 2 (1).

CONSIDERATION.

See COUNTIES, 5. COUNTY BOARDS (5).

The release by a wife of her dower and homestead interest in land sold is a good consideration to support an arrangement giving her a joint interest in the price received therefor. *Fiedler v. Howard,* 388

CONSPIRACY. See DAMAGES, 3. DEBTOR AND CREDITOR. FRAUD, 3.

CONSTITUTIONAL LAW.

See COUNTIES, 1-6. MUNICIPAL CORPORATIONS, 1, 4, 5, 12.

1. To ascertain the amount of indebtedness which a municipal corporation may incur in addition to that already existing, within the limit of five per centum upon the value of its taxable property, as fixed by sec. 3, art. XI, Const., the amount of cash on hand, and its available assets and resources easily convertible into cash to meet the payment of such liabilities when they become due, are to be subtracted from such existing indebtedness. *Crogster v. Bayfield County,* 1

2. An act of the legislature cannot properly be judicially declared void for uncertainty if it will admit of any reasonable construction that will support it. *Wentworth v. Racine County,* 26

3. The mere wisdom or reasonableness of a law is not a matter for judicial determination, but is exclusively within the domain of legislative power. *Ibid.*

4. Ch. 250, Laws of 1895, delegating to county boards power to legislate in regard to officers' fees in certain cases, is constitutional under the rule in *Ryan v. Outagamie Co.* 80 Wis. 336. *Ibid.*

5. The constitutional and statutory requirement for the publication of laws as a prerequisite to their validity does not extend to the publication of mere ordinances, resolutions, and proceedings of local governing bodies, pursuant to a valid grant to such bodies of power to legislate in regard to such matters. *Ibid.*

6. The general statute requiring the publication of the proceedings of county boards is directory, and a failure to comply therewith does not invalidate such proceedings. *Ibid.*

7. The act authorizing the incorporation of trust companies and giving them power to act as assignees, without giving bond or security in the discretion of the court, other than by deposit of securities with the state treasurer (sec. 6, ch. 263, Laws of 1891, as amended by ch. 160, Laws of 1895), is a general law, and is not subject to objection under sec. 31, art. IV, Const., prohibiting special legislation for granting corporate powers or privileges, or discriminating in favor of a class. *Roane Iron Co. v. Wisconsin Trust Co.* 273

8. That act confers no banking powers upon such companies, but expressly excludes the exercise thereof, and it did not need to be submitted to a vote of the people under sec. 5, art. XI, Const. *Ibid.*

CONTRACTS.

See AGENCY, 1, 2. CONSIDERATION. COUNTIES, 1, 2, 4, 5. DAMAGES, 1, 2. ELECTION OF REMEDY. EQUITY, 4. INSURANCE, 1, 2, 7–9, 14. MASTER AND SERVANT. MECHANICS' LIENS, 3, 7. MUNICIPAL CORPORATIONS, 11. PLEADING, 5. RELEASE. STATUTE OF LIMITATIONS, 2. WAIVER, 3, 4.

1. A provision in a contract for the sale of goods to be delivered at different times, that "if, during the deliveries on this contract, the price should be below the price herein named, we agree to rebate such difference on deliveries so affected," is to be construed as meaning by the words "the price," when first used, "the market price." *Wing v. Wadhams Oil & Grease Co.* 248

2. A machine sold under a warranty which provided that "if the purchaser does not make full settlement, in cash or approved notes, for the machine, on its delivery to him, he thereby waives all claims under this warranty," was delivered by the seller on the premises of the buyer without any request for settlement by note, and about one month afterward, with knowledge of the facts, he received and retained the buyer's note for the price. *Held*, that the seller thereby waived his right to rely upon the delay of settlement as a forfeiture of the special warranty. *Trapp v. New Birdsall Co.* 458

3. A provision in a contract of sale of a machine expressly requiring the purchaser to give written notice of all defects to the seller with reasonable time to repair the same, is a condition precedent, compliance with which is essential to a recovery for a breach of the warranty. *Ibid.*

4. A breach of warranty, that a fifteen horse power engine sold under it was "capable of doing as much and as well as other machines of like size and proportions," is not established by proof merely that it did not or could not be made to develop and maintain fifteen horse power, without evidence that other engines of the size and proportions of the one in question were capable of developing and maintaining effectively that much power. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 3, 5, 7, 10, 11. RAILROADS, 3.

CONVEYANCES. See CHATTEL MORTGAGES. CLOUD ON TITLE. CONTRACTS. DEEDS. FRAUD, 1, 4. FRAUDULENT CONVEYANCES. MORTGAGES. STATUTE OF LIMITATIONS, 2.

CORPORATIONS.

See CONSTITUTIONAL LAW, 7. COUNTIES. COUNTY BOARDS. ELECTION OF REMEDY. FRAUD. GARNISHMENT, 4. MUNICIPAL CORPORATIONS.

1. A corporation may ratify the unauthorized act of one claiming to be its agent as well as may a natural person. *Moody & Mecklelburg Co. v. Trustees of M. E. Church,* 49

2. Directors of corporations, independent of any statute on the subject, are liable for corporate property misapplied or lost through their culpable negligence or fraud, and under secs. 3237, 3239, R. S. 1878, any creditor of such corporation can maintain an action in equity against such directors to enforce such liability. *Gores v. Day,* 276

3. Where a person who has been illegally elected secretary and treasurer of a corporation has taken possession of the corporate books and papers, and is recognized by the corporation as such officer, his right to the office must be recognized by outsiders. Jurisdiction in proceedings to attach corporate stock under sec. 2989, R. S. 1878, cannot therefore be obtained by service of a copy of the writ on the *de jure* secretary. *Barthell v. Hencke,* 660

COSTS.

See APPEAL, 5, 54.

1. Under secs. 2918, 2920, S. & B. Ann. Stats., if plaintiff recovers less than $100 in an action commenced in the circuit court on contract, the defendant is entitled to costs. *Field v. City of Elroy,* 412

2. In the taxation of costs, witness' fees supported by the usual affidavit of disbursements may properly be taxed, notwithstanding an affidavit by a stranger to the effect that he is informed and believes that no fees were paid to a certain witness named in the bill of costs, and that he was not subpœnaed. *Ellis v. Allen,* 598

COUNTIES.

See COUNTY BOARDS.

1. If a contract between a county and a railway company, for the issuing of bonds in aid of such company in excess of five per cent. on the value of its taxable property, is an entire contract, all bonds issued under it are absolutely void. The court cannot scale it down to an amount which the county might legally issue. *Crogster v. Bayfield County,* 1

2. A contract entered into by the acceptance by a county of a proposition by a railroad company to build a railroad in six distinct sections, for each section of which the county is to issue its bonds of particular numbers, and upon the completion of such section or of a succeeding section the county is to deliver to the company the bonds issued for that section, in return for an equivalent amount of stock, is not entire but severable, and bonds so issued, not in excess of the constitutional limitation, will be valid. *Ibid.*

3. A proposition submitted to a county by a railroad company in that form is a "definite proposition," within the requirements of secs. 943-948, R. S. 1878, specifying when the bonds shall be delivered with reference to the time of the complete construction of the railroad from point to point; and bonds issued in conformity to

such proposition, and not in excess of the constitutional limitation, will in that respect be valid. *Ibid.*

4. Such a proposition by a railroad company, when accepted by the county, becomes an indebtedness of the county, within the meaning of the constitutional limitation, and will be deemed to have been incurred at the date of the contract, and not at the time of the completion and acceptance of the work. *Ibid.*

5. The issuing by the railroad company of its certificates of stock and depositing the same in escrow, in accordance with such contract, is a good consideration for the issuing by the county of its bonds and agreeing to deposit and pay the same, and each party thereby becomes irrevocably bound by the contract. *Ibid.*

6. The constitutional limitation of five per centum is based upon the last assessment preceding the incurring of the indebtedness, and not upon that last preceding the completion of the work. *State ex rel. M., T. & W. R. Co. v. Common Council of Tomahawk*, 96 Wis. 73, overruled. WINSLOW, J., dissents. *Ibid.*

7. Where the bonds of the county, in such a case, are issued to the "railroad company, its successors or assigns," the county cannot escape liability merely because the company has transferred to another all its interest in the bonds to be earned on the completion of certain sections of the railroad. *Ibid.*

COUNTY BOARDS.

See CONSTITUTIONAL LAW, 4–6. NOTICE.

The county of Washburn, having a judgment against its treasurer and his bondsmen for money lost through depositing the same in an insolvent bank, and having exhausted all legal remedies to collect the same, and the assets of the bank being in the hands of an assignee under a voluntary assignment for the benefit of creditors, and the treasurer having conveyed to the county his claim against such bank for the public money deposited therein and lost as aforesaid, which claim the county held as security for the payment of the judgment, the county board took the bond of the bank, with sureties, to secure the payment of such collateral claim in one year, and as consideration therefor, named in the bond, gave that time to the bank in which to pay such indebtedness. *Held:*

(1) That all legal remedies having been exhausted to collect the judgment, under express statutes on the subject, the duty to make further efforts to collect it devolved on the county board, and to that end such board possessed express authority to make such contracts and do such acts as in its wisdom were necessary and proper.

(2) That the power of the county board under the statute was sufficiently broad to enable it to apply to the situation the rules of business conduct by which a prudent person is ordinarily governed under similar circumstances in his private affairs.

(3) That the doctrine that the governing body of a corporation has no power to discharge a debt due to it without payment, does not apply to debts of questionable validity before final judgment, or debts against insolvent parties after judgment.

(4) That though a municipal board must confine its operations to the powers conferred upon it by law, and has no power to squander or give away corporate property or discharge debts

against a solvent party, it may settle disputed or doubtful claims as an incident to the right to maintain and defend actions, as well as under the express power conferred by statute to make such contracts and do such acts as are deemed necessary and proper to the exercise of the powers and privileges granted to, and duties charged upon, counties.

(5) That the giving of time, without interest, for the payment in one year of a claim of doubtful collectibility, in consideration of a bond with sureties, for payment at that time, is sufficient consideration to support such bond.

(6) That the fact that members of the county board who voted in favor of taking the bond were interested in giving the bank time to pay its indebtedness, if a defense to an action on the bond, is not available unless pleaded and insisted on as such. *Washburn County v. Thompson*, 585

COUNTY JUDGE. See ESTATES OF DECEDENTS, 5–7.

COURT AND JURY. See APPEAL, 29, 30, 36. FRAUDULENT CONVEYANCES, 5. MUNICIPAL CORPORATIONS, 9. NEGLIGENCE, 4–8.

COURTS. See JUDGE.

CREDITORS' ACTION. See CORPORATIONS, 2. ESTATES OF DECEDENTS, 5–7.

CRIMINAL LAW AND PRACTICE.

See HABEAS CORPUS. JUDGE. JURISDICTION.

1. A police officer cannot lawfully arrest a person for a misdemeanor without a warrant, unless it was committed in his presence, even though there may be a city ordinance giving him authority to do so. *Stittgen v. Rundle*, 78

2. A court which has obtained jurisdiction of the person of one arrested on a charge of burglary does not lose jurisdiction to afterward try him for that offense by reason of the fact that he had in the meantime been arrested, tried, and convicted by another court for the crime of petit larceny, and was still suffering imprisonment for that offense when he was brought to trial for the burglary. *In re Roszcianella*, 534

3. By appearing in court with his counsel on the trial for burglary, pleading not guilty, and going to trial without disclosing that he was then serving a term of imprisonment for larceny, and when called upon after conviction giving no reason why sentence should not be pronounced upon him, the prisoner waives the objection. *Ibid.*

CUSTOM. See NEGLIGENCE, 6.

DAMAGES.

See ABATEMENT, 1, 2. APPEAL, 37, 41, 53, 56. EVIDENCE, 6. LIBEL. MASTER AND SERVANT. RAILROADS, 2 (4).

1. Where a contract of employment has been unjustly terminated, the employee is entitled to compensation for such damages as the employer might reasonably have anticipated would result to his employee by the discharge. If such damages consist of profits lost, and the evidence furnishes reasonable data upon which to compute them, such lost profits are a proper measure of damages and are recoverable. *Schumaker v. Heinemann*, 251

2. A verdict for $3,500 damages for a breach of a promise of marriage, against a defendant who was worth only $6,000, *held* to be so excessive as to show passion or prejudice on the part of the jury. *Kellett v. Robie,* 303

3. One who is driven out of business by a conspiracy in restraint of trade, and compelled to sell his property for less than its value, is entitled to recover, as damages therefor, such sum as would measure his loss of profits and also loss by diminution in the value of his property by reason of the unlawful acts of the defendants. *Bratt v. Swift,* 579

4. In an action for slander, only compensatory damages are recoverable, where there is no proof of actual malice or ill-will, or of facts and circumstances from which they can justly be inferred. They cannot be so inferred from mere proof that the defendant, the commander of a vessel, when the plaintiff, an employee, was leaving the vessel, ordered him never to return, and when asked why, said in the hearing of others, "you stole,— detectives saw you.— I wont have any thieves on board." *Reed v. Keith,* 672

DEBTOR AND CREDITOR.

See ATTACHMENT. BANKS AND BANKING, 2. COUNTY BOARDS. GARNISHMENT, 1, 2, 3. GUARANTY. VOLUNTARY ASSIGNMENT.

A general creditor of one who, when perfectly solvent, without fraud, purchased goods of him on sixty days credit, cannot maintain an action on the case against such debtor, and against other defendants with whom he subsequently conspired by confessing judgment on fictitious notes to place all his property beyond the reach of such creditor, to recover damages therefor. *Field v. Siegel,* 605

DEEDS.

See EQUITY, 1, 2, 4. EVIDENCE, 10. FRAUDULENT CONVEYANCES, 3–6.

1. Where a deed, in describing the property conveyed, refers to a map or plat as marking the natural boundaries of such property, such plat should be considered as giving the true description as much as though it was marked down on the deed. *Slauson v. Goodrich Transportation Co.* 20

2. No particular form is necessary to constitute the delivery of a deed. It is sufficient that the minds of the contracting parties meet, expressly or tacitly, in the intent to give it effect. Until delivered with such intent it never becomes operative. *Curry v. Colburn,* 319

3. The mere handing of a deed, which is not dated or acknowledged, to the grantee named therein at his request, to be examined by his lawyer, and the bargain to be completed at a subsequent meeting of the parties, is not such a delivery as will make it operative. *Ibid.*

4. In an action to set aside a deed executed by a person since deceased, on the ground that he was mentally incompetent when he executed it, the testimony of intelligent and disinterested witnesses, who had known him for a long time, that he seemed intelligent and reasonable at that time, and that they noticed nothing wrong with him, *held* sufficient to sustain a finding that he was mentally

competent at the time he executed the deed, notwithstanding there was evidence that the year before its execution, having become despondent from business reverses, he attempted suicide, and that subsequent to his wife's death, six years thereafter, he appeared deranged and was committed to an insane asylum, where he died. *Jones v. Rice,* 429

5. A deed duly executed will be presumed to have been executed on the day it bears date, and the fact that it had no certificate of the official character of the notary who took the acknowledgment in another state, until after the land conveyed had been attached by creditors of the grantor, is not sufficient to overcome that presumption, or the finding of the court that it was so executed. *McFarlane v. Louden,* 620

6. In the absence of fraudulent intent, a deed absolute in form, given as security for a *bona fide* debt previously incurred, is not fraudulent; and the mere fact that such deed was not recorded until after the land had been attached as the property of the grantor, is not sufficient to show it to be fraudulent as to creditors. *Ibid.*

DE FACTO OFFICER. See CORPORATIONS, 3.

DEFINITIONS. See WORDS AND PHRASES.

DELIVERY. See DEEDS, 2, 3. EVIDENCE, 3.

DEMAND for jury trial. See MECHANICS' LIENS, 5.

DIRECTORS, liability of. See CORPORATIONS, 2.

DISCRETION. See APPEAL, 32. EXCISE. GARNISHMENT, 5. INJUNCTIONS, 1-3. MANDAMUS, 1. MASTER AND SERVANT, 1. PRACTICE, 2, 3.

DIVORCE.

1. A judgment of divorce, granted to the plaintiff on the ground of desertion, will not be disturbed on appeal, where it appears that it was for the interest of both parties, although there was considerable evidence tending to show that the defendant was compelled to leave the plaintiff by reason of his cruel treatment, but the answer fails to allege such or any other fact as a counterclaim. *Olson v. Olson,* 107

2. Unless the decree, in an action for divorce and alimony, not only grants the divorce, but gives alimony or makes an allowance for the wife, the court has no power under sec. 2369, R. S. 1878, afterward to open the judgment or to make any additional judgment for alimony. Expressions to the contrary in *Cook v. Cook,* 56 Wis. 195, and *Crugom v. Crugom,* 64 Wis. 253, overruled. *Bassett v. Bassett,* 344

DOWER. See CONSIDERATION.

EASEMENTS.

1. By twenty years of open, notorious, continuous, adverse use and enjoyment of an artificial ditch to drain water from the land of one person onto and across that of an adjoining owner, by the consent of such owner, such person acquires by prescription the right to a continuance of such use and enjoyment. *Wilkins v. Nicolai,* 178

2. Such open, notorious, and continuous use for twenty years, without objection from the servient owner, is *prima facie* evidence of ad-

verse possession or use, and, together with such circumstances, establishes title by prescription, unless explained as consistent with the title of the true owner by some showing that such use was under a lease, contract, or permission of some kind. *Ibid.*

3. The owner of a right of way across the land of another, whether it was acquired by grant or by prescription, is entitled only to a reasonable and usual enjoyment thereof, in view of all the circumstances of the case and of the use then and theretofore made of the premises affected by it, and the owner of the soil is entitled to all the rights and benefits of ownership consistent with the easement. *Dyer v. Walker,* 404

4. The owner of land which is subject to a right of way may maintain a gate across such way, if it is necessary to his use and enjoyment of his land and does not unreasonably interfere with the use of the way. *Ibid.*

5. Where a gate erected across a right of way by the owner of the land burdened with the easement does not unreasonably interfere with the use of the way, the removal of such gate by the owner of the easement is a trespass. *Ibid.*

EJECTMENT.

See APPEAL, 2.

1. In order to recover in ejectment, where neither the pleadings nor the proof show that the parties derived their titles from a common grantor, or show the source of the defendant's title, or that he had ever been in possession of the land, the plaintiff must either connect himself with the government title or with some grantor who was the common source of title to both parties. *Slauson v. Goodrich Transportation Co.* 20

2. Where R. and N., who were owners of adjoining lots, each occupied up to the division line between them, and N. built a barn with a foundation resting wholly upon his own land, but the eaves projected and overhung that line some ten or eleven inches and the drip therefrom fell upon the roof of R.'s barn, built close to the same line, and were carried thereby so as to fall on N.'s land, and no complaint was made until suit brought, and no damage was proved, *held* that, upon these facts, R. could not maintain ejectment for such projection of N.'s roof over his land. *Rasch v. Noth,* 285

3. The original owner of land which is wild or unoccupied cannot, under sec. 3075, R. S. 1878, maintain an action of ejectment for such land against one who disclaims title, and who had, before the commencement of the action, conveyed a title held by him under a tax deed to a third party, by a deed which was not recorded until after the filing of the notice of *lis pendens* in the action. *Webster v. Killen,* 525

ELECTION between causes of action. See APPEAL, 35.

ELECTION OF REMEDY.

See EQUITY, 5, 6. FRAUD, 1.

1. In an action against a corporation and its promoters to recover moneys which the plaintiff was induced to pay for stock by the false representations of such promoters as to the price of certain

land that was conveyed by them to the corporation, judgment was rendered against the promoters but not against the corporation, but on appeal by the promoters the judgment was reversed on the ground that the plaintiff's contract to buy stock could not be rescinded as to the promoters and affirmed as to the corporation, and on filing the *remittitur* the plaintiff recovered of the promoters the amount due from them on an accounting for the profit they had made by charging the corporation an excessive price for said land. He then appealed from the judgment in favor of the corporation. *Held*, that he had elected his remedy and affirmed his contract to buy stock. *Franey v. Wauwatosa Park Co.* 40

2. Where, in such a case, the parties defrauded elected to rescind the contract and sue for the consideration paid, instead of suing for damages for the fraud, it was bound by such election. *Limited Investment Asso. v. Glendale Investment Asso.* 54

ELECTRIC RAILWAYS. See RAILROADS, 1.

EMINENT DOMAIN. See RAILROADS, 1.

EQUITY.

See AGENCY, 3. APPEAL, 22. CLOUD ON TITLE, 1, 3. CORPORATIONS, 2. INJUNCTIONS, 4. STATUTE OF LIMITATIONS, 1.

1. Owners of the legal title to land, though not in possession, may maintain an action in equity, independent of the statute, to remove clouds from the title. *Kruczinski v. Neuendorf*, 264, 271

2. Owners of land, who have been deprived of possession under a void decree and fraudulent conveyances, which constitute clouds upon their title, have no such adequate remedy at law as will preclude them from maintaining an equitable action to remove such clouds and recover possession of the land. *Ibid.*

3. A corporation standing confessedly in arrears to the state in large sums cannot invoke the aid of equity to restrain the commissioner from an effort to enforce the law. *Travelers' Ins. Co. v. Fricke*, 367

4. The consideration for the conveyance of a farm and personal property by parents to their son was his agreement to support them during the remainder of their lives; to furnish them each year certain food supplies, the use of certain portions of the dwelling with free ingress and egress to any part thereof; to furnish them plenty of firewood and water ready for use at all times, and to care for them in all things, and furnish them with a doctor and medicine when needed, and with decent burial when dead. *Held*, that the agreement, fairly interpreted, required the son to devote his personal efforts to support and care for them, and that his failure to furnish his parents with a sufficiency of wood and water, and his getting married and removing several miles away, and failing to give them any personal care or attention, even when sick, but leaving them chiefly to care for themselves, were substantial breaches of his agreement, for which a court of equity would set aside the conveyances. *Knutson v. Bostrak*, 469

5. Although, as a part of the transaction, the son gave to his parents a mortgage on a part of the farm as security for the performance of his agreement, and another mortgage to secure the payment of a sum of money, they were not limited to their remedy on such mortgages. *Ibid.*

6. That the parents commenced an action to foreclose one of such mortgages, which however they dismissed before commencing the

action to set aside the conveyances, was no waiver of or bar to their right to maintain the latter action to obtain the relief sought therein. *Ibid.*

ESTATES OF DECEDENTS.

See ABATEMENT. CLOUD ON TITLE. DEEDS, 4. EVIDENCE, 8. HUSBAND AND WIFE.

1. The fact that a testator has made his debtor the executor of his will does not discharge the debt, if the creditors of the estate will be injured thereby, or if the will shows any intention to the contrary. The debt will be deemed assets in the hands of the executor, as if the money had been paid to him, and he cannot escape liability therefor by failing to charge himself with it in his inventory. *Lynch v. Diran*, 66 Wis. 400, explained and in part disapproved. *Estate of Robinson v. Hodgkin*, 327
2. Upon an accounting by an executor as to an estate which consisted in part of a lease of a homestead and a lot adjoining it on which was a saloon, for a gross sum, *held*, that the practical construction put upon it by the testator and the tenant and the executor, in considering the value of the rental of the saloon to be one half of that gross sum, should be placed upon it by the court and the executor be charged with one half that sum. *Ibid.*
3. On appeal in the matter of an accounting by an executor, an order that he charge himself with an error in the footings of his account was reversed, no such error appearing in the record. *Ibid.*
4. Where the executrix of one estate contested the final account of the executor of another estate, claiming the right to do so as a creditor, not in her own name as personal representative, but in the name of the "estate" represented by her, *held*, that the error was immaterial. *Ibid.*
5. Under the provisions of sec. 3835, R. S. 1878, authorizing any creditor of an estate whose claim has been allowed, whenever there is just reason to apprehend that such estate as inventoried may be insufficient to pay the debts, to bring an action in the circuit court on behalf of all the creditors, to reach and subject to sale any real estate or other assets not inventoried, which, according to law, ought to be subjected to the payment of such debts, such an action may be brought and maintained by a creditor whose claim has been allowed, notwithstanding an appeal has been taken from the allowance thereof. *Richter v. Leiby*, 512
6. The maintenance of such action in the circuit court is not affected by sec. 4036, R. S. 1878, which refers only to proceedings in the county court and the effect of an appeal therein. The action in the circuit court is ancillary to the proceedings in the county court, is in favor of all the creditors, and does not depend upon any single judgment rendered in the county court, and cannot, under sec. 3836, R. S. 1878, be brought to trial until the sufficiency or insufficiency of the assets has been determined, but may be held and maintained in the meantime. *Ibid.*
7. A county judge who, in pursuance of sec. 4015, R. S. 1878, has presented a claim upon a bond, given in an estate which is being administered in his own county, for allowance in proceedings for the administration of the estate of one of the sureties therein in the county court of another county, and had it allowed, is a creditor of that estate, who may maintain an action under sec. 3835,

R. S. 1878, notwithstanding sec. 4015 provides that the judgment in the action shall specify the amount found due to each particular person for whose benefit it is brought. He stands in the relation of trustee of an express trust, and the suit should be in his name and not in that of the beneficiaries whom he represents. *Ibid.*

ESTOPPEL. See AGENCY, 3 (7). APPEAL, 10, 11. INSURANCE, 12. MUNICIPAL CORPORATIONS, 11. WAIVER, 1, 2.

EVIDENCE.

See APPEAL, 17, 19, 32, 47–49. CONTRACTS, 4. DEEDS, 4, 5. EASEMENTS, 2. FRAUDULENT CONVEYANCES, 2–6. HIGHWAYS, 4. INSTRUCTIONS. INSURANCE, 4–6. LIBEL, 1, 3. MASTER AND SERVANT, 3. MECHANICS' LIENS, 2. PLEADING, 4. PRACTICE, 2, 3.

1. Where a judgment is vacated, the action stands for trial as if it never had been tried, and the fact that evidence which was incompetent was admitted at the former trial is no reason for its admission upon a subsequent trial. *Slauson v. Goodrich Transportation Co.* 20
2. Admissions in the complaint in an attachment case that the debt sued on is founded upon an express contract and not yet due are *prima facie* competent evidence of those facts as against the plaintiff, upon a motion to set aside the attachment. *Lederer v. Rosenthal,* 235
3. Parol evidence is admissible to show that a written instrument, although in the hands of the grantee, has never in fact been so delivered as to bind the parties. *Curry v. Colburn,* 319
4. The rule that a party cannot impeach his own witness is violated by permitting such party to read from the testimony given by such witness in another case, and to examine him in relation thereto, for the purpose of contradicting his testimony at the trial. *Collins v. Hoehle,* 639
5. Courts will not take judicial notice of the acts and ordinances of municipal corporations. *Stittgen v. Rundle,* 78
6. In order to recover damages on the ground that the injury complained of is permanent, the evidence must show such permanency with reasonable certainty. To allow an expert physician to testify that the plaintiff was liable to be bothered with the injury for several years and might be always, at least under certain conditions, such as overuse of the injured member, was error. *Collins v. City of Janesville,* 464
7. It was also error, in such action, to allow such expert physician to testify to the effect that consumption in the family of plaintiff's parents would show a strong susceptibility in all the family to the infection of consumption, particularly in swollen tissues which do not fully recover their normal condition after injury, such evidence being, at most, conjectural, and certainly inadmissible without first laying a foundation for it by showing that the plaintiff was consumptive or reasonably certain of being so. *Ibid.*
8. In an action by an administrator to recover certificates of deposit in possession of and claimed by the widow of the decedent, testimony by the defendant that she did not indorse the name of the decedent upon such certificates, and that she had had them in her

possession since nearly two months before his death, is not incompetent under sec. 4069, R. S. 1878. These are not statements of transactions with a deceased party. *Murphy v. Quinn*, 466

9. Evidence that the amount of the debt stated in a chattel mortgage given to secure a partnership debt includes an individual debt of one of the partners, though tending to show fraud, may be repelled by the circumstances surrounding the transaction. Such a mortgage will be a lien only for the partnership debt. *Rock v. Collins*, 630

10. The fact that the garnishee took an absolute deed of property as additional security, instead of a mortgage, is not conclusive evidence that the transaction was fraudulent, where there is evidence of good faith and the absence of fraudulent intent. *Ibid.*

EXCEPTIONS. See APPEAL, 18.

EXCISE.

The plain legislative policy of this state being that no stay of proceedings shall be obtainable to interfere with the proceedings of the governing board of a town, city, or village, in revoking a license to sell liquors, or to stay the effect of such revocation pending proceedings to test its legality, it is an unjustifiable use of the discretionary power of the circuit court to grant such a stay pending an appeal to this court from an order refusing a temporary injunction against a city council in such proceedings. *McLellan v. Mayor and Common Council of Janesville*, 544

EXECUTIONS.

It is a condition precedent to the exemption from execution of abstract books, maps, etc., under subd. 13, sec. 2982, R. S. 1878, that they be "kept or used" by the debtor for the purpose of making abstracts of title to land at the time of the levy. The exemption is personal to the debtor, and is abandoned and lost if, before the seizure, he absconds from the state, with intent to avoid service of process and without intent to return. *Spence v. Rambusch*, 676

EXECUTORS AND ADMINISTRATORS. See ESTATES OF DECEDENTS, 1–4. HUSBAND AND WIFE.

EXEMPTIONS. See EXECUTIONS.

EXPERT TESTIMONY. See EVIDENCE, 6, 7. INSURANCE, 5.

FALSE IMPRISONMENT. See CRIMINAL LAW, 1.

FEES. See COSTS, 2. INSURANCE, 11, 13. INTEREST.

FINDINGS. See APPEAL, 26–39. FRAUD, 3.

FIRE INSURANCE. See INSURANCE, 14.

FELLOW-SERVANTS. See NEGLIGENCE, 2.

FORECLOSURE.

See APPEAL, 1, 6, 7, 24, 25, 28. ATTORNEY AND CLIENT. EQUITY, 6. PLEADING, 2, 3.

In an action for the foreclosure of a land contract the proper judgment is one of strict foreclosure, but the entry of a judgment for a foreclosure and sale and conveyance of the land is a mere irreg-

ularity, which is waived by a defendant who resists a motion to have such judgment corrected, and he is precluded from afterward objecting thereto. *Nelson v. Jacobs*, 547

FOREIGN CORPORATIONS. See INSURANCE, 11-13. STATUTE OF LIMITATIONS, 1.

FORFEITURE. See CONTRACTS, 2.

FRAUD.

See ATTORNEY AND CLIENT, 1. BANKS AND BANKING, 2. CORPORATIONS, 2. DEEDS, 5, 6. ELECTION OF REMEDY. EVIDENCE, 9, 10. FRAUDULENT CONVEYANCES. GARNISHMENT, 1-3.

1. The agent of the vendor of land, who had acquired the right to buy such land at a certain price, and who was also one of the promoters of a corporation organized to buy such land, sold the same to such corporation at a price which he represented to be the price to be paid to the vendor, but which in fact included a large commission to be paid to himself. The vendor, with full knowledge of the facts, conveyed the land to such agent and he to the corporation; and the vendor, on receiving payment for the land, paid such agent his commission. *Held*, that the transaction was a fraud upon the corporation, and that it might exercise an option, on tendering back the property received, to rescind the contract and compel the vendor to refund the consideration paid by it. *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345; *Franey v. Warner*, 96 Wis. 222; and *Hebgen v. Koeffler*, 97 Wis. 313, followed. *Limited Investment Asso. v. Glendale Investment Asso.* 54
2. An action to recover the consideration paid, in such a case, is really one on an implied promise to pay back money had and received, the basis of which is the loss to the plaintiff and the consequent enrichment of the defendant; and where, in such an action against the vendor and his agent, it appears that the money was paid to the vendor for his sole use, and that the only benefit the agent derived from it was his commission paid by the vendor, such agent cannot be held liable, but the plaintiff must look to the party to whom it paid the money. *Ibid.*
3. Although the complaint in such an action charges a conspiracy between the defendants to defraud the plaintiff, yet, where the special verdict substantially covers the facts necessarily involved in the case, a finding as to whether such a conspiracy existed is unnecessary, that being but a legal conclusion from the facts found. *Ibid.*
4. One D., having purchased land, paid a part of the price, and bound himself to pay the balance and to build upon and carry on a certain business on the premises, organized a corporation to carry on that business, not having previously intended to do so, and sold the land to it at an advanced price. The subscribers for stock knew at what price it was to be purchased and had the means of knowing its value, but did not inquire what D. had paid for it, and were not influenced to purchase by any false statement or representation or any breach of duty or trust on his part. *Held*, that the stockholders could not complain because of D.'s having charged the corporation more for the land than he paid for it. *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; *Franey v. Warner*, 96 Wis. 222; and *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, distinguished. *Milwaukee Cold Storage Co. v. Dexter*, 214

5. A statement in the prospectus for such corporation in the terms "Cost of ground, $40,000," cannot be construed as a representation that the land cost that sum to the stockholder who offered it to the corporation. *Ibid.*

6. It cannot be construed as a fraud upon the corporation or upon the other subscribers that D., out of his own funds, paid to one of the subscribers a commission to induce him to subscribe or to procure others to do so, which would render D. and such other subscriber liable to the corporation for the profits made by them on the sale. *Ibid.*

7. Neither was it a fraud upon the corporation that D., in order to induce his vendor, without whose consent he could not sell, to become a subscriber, personally paid him a sum of money. *Ibid.*

8. D. did not, by purchasing land in his own name and offering to sell it to a corporation organized by him, become an agent or trustee of such corporation. *Ibid.*

FRAUDULENT CONVEYANCES.

See DEBTOR AND CREDITOR. GARNISHMENT, 1–3.

1. In order to render a chattel mortgage of a stock of goods, given to secure a pre-existing *bona fide* debt, voidable as being fraudulent as to other creditors, the mortgagee must have actually participated in the fraudulent intent. So long as his purpose was simply to secure his own debt, his knowledge of the fraudulent purpose of the mortgagor will not affect the security. *H. B. Claflin Co. v. Grashorn,* 356

2. It is no evidence of fraud that the notes secured by the mortgage are guaranteed by a third party. The holder has the same right to take other security as if they were not guaranteed. *Ibid.*

3. A conveyance of property with intent on the part of the grantor, participated in by the grantee, to *delay* the creditors of the former, is fraudulent as to such creditors, and a refusal of the court so to charge the jury, when specially asked to do so, after having charged them that a conveyance made with intent to "hinder, delay, *and* defraud" creditors, and also that one made with intent to "hinder, delay, *or* defraud" creditors, would be void as to creditors, tends to mislead the jury and is therefore error. *Bleiler v. Moore,* 486

4. In an action involving the question whether a conveyance was fraudulent, the party making it may testify to his intent, yet his testimony is not conclusive and does not necessarily outweigh the evidence of facts and circumstances tending to contradict it. *Ibid.*

5. In an action to recover a part of the price paid to defendant for a farm, on the ground that the plaintiff was induced to buy and pay for the same as containing 110 acres, at a certain price per acre, by the false and fraudulent representations of the defendant that it contained that number of acres, *held,* that there was sufficient evidence of the fraud alleged to require the submission of the case to a jury; and that the acceptance of a deed, drawn in the precise terms of the contract, without knowledge of the facts, did not purge the transaction of fraud. *Ohlert v. Alderson,* 86 Wis. 433, distinguished. *Meloy v. Peterson,* 489

6. Evidence showing that a deed of land, though recorded, was executed without the knowledge of the grantee, and was never delivered to him until after an action was commenced to set it aside, and was not intended to be delivered except upon condition that he immediately execute a conveyance back to his grantor, and that the object of the transaction was to place the title of the property beyond the reach of the grantor's creditors, is sufficient to show that such deed was fraudulent. *Sheboygan Boot & Shoe Co. v. Miller*, 527

FRIVOLOUS PLEADING. See PLEADING, 2.

GARNISHMENT.

See EVIDENCE, 10. INSOLVENCY.

1. Property transferred under a conveyance which is void as to creditors is subject to garnishment under sec. 2768, R. S. 1878, even though the property should be seized under attachment or execution. Sec. 2753, R. S. 1878, should be construed as referring to property which is not in the hands of persons claiming title or ownership thereof. *Holton v. Burton*, 78 Wis. 321, distinguished. *Dahlman v. Greenwood*, 163

2. The rights acquired by a garnishment of one holding property under a conveyance void as to creditors are not affected by a voluntary assignment made eight days afterward. *Ibid.*

3. Where one creditor has garnished the holder of property of the debtor under a conveyance void as to creditors, and also two insurance companies against whom the debtor had claims, the other creditors whose garnishments did not affect the latter claims might properly be subrogated to the rights of the first creditor in case he was paid out of the other property. *Ibid.*

4. In garnishment proceedings against a trust company, by a creditor of a corporation for which it is assignee, the question cannot be raised whether the capital stock of such trust company has been paid up in cash or securities. *Roane Iron Co. v. Wisconsin Trust Co.* 273

5. To permit a garnishee defendant, whose original answer was a denial of liability under the statute, to amend such answer at the trial, after the plaintiff's evidence is in, by admitting his holding of certain property of the principal defendant and setting forth the facts showing that he holds the same as collateral security for a debt owing him by such defendant, was not an abuse of discretion. *Rock v. Collins*, 630

6. The objection that a garnishee's answer is not verified is waived if not made at the time the same is filed. *Ibid.*

GUARANTY.

See FRAUDULENT CONVEYANCES, 2.

One who, on transferring notes and a mortgage, guarantees the payment of the notes, cannot claim to be released from liability by a release of the mortgage, which was given by mistake but has been reformed so that the mortgage is a valid lien on the property as against the owner. *Kane v. Williams*, 65

HABEAS CORPUS.

1. Sec. 3409, R. S. 1878, vests in the supreme court and the justices thereof exclusive jurisdiction to issue writs of *habeas corpus* to inquire into the legality of the detention of persons confined in the state prison, and that applies where the detention is in the house of correction of Milwaukee county in lieu of in the state prison at Waupun, under the statute permitting confinement in such house in lieu of such prison. *State ex rel. Heiden v. Ryan,* 123

2. A writ of *habeas corpus* only raises the question of the jurisdiction of the court or officer to issue the process under which the prisoner is held in custody. *In re Roszcynialla,* 334

HIGHWAYS.

See MANDAMUS, 2. MUNICIPAL CORPORATIONS, 1–3, 5–9, 12. NEGLIGENCE, 10, 11. PLEADING, 7. RAILROADS, 1, 2.

1. [Whether the power of town boards to change the grade of highways extends beyond such changes as may be necessary to make them safe for travel, to the prejudice of abutting owners, questioned but not decided.] *Zehren v. Milwaukee Electric R. & L. Co.* 83

2. In an action against a town for an injury alleged to have been caused by a defect in the highway, it appeared that the plaintiff when driving a horse on a dark night struck the horse and drew up on the lines, and the horse starting quickly one of the lines broke, and as he pulled the other line the horse veered and the cart wheel hit a stone in the highway and he was thrown out and injured. *Held,* that the proximate cause of the injury was not the stone, but the breaking of the line and the pulling on the other line which caused the horse to veer out of her course. *McFarlane v. Town of Sullivan,* 361

3. *It seems* that an ordinary turnpike road, constructed as they generally are through low lands, which is nine and one-half feet wide at the surface and slopes at each side to a ditch whose bottom is two and one-half feet below such surface, comes up to the standard of reasonable safety, which is the limit of the duty the public owes to a traveler. *Bodah v. Town of Deer Creek,* 509

4. In order to recover for the loss of an animal killed by falling through a trestle bridge on a railroad track, alleged to have been caused by the failure of the railroad company to erect and maintain cattle guards at a highway crossing, as required by sec. 1810, S. & B. Ann. Stats., the plaintiff must prove that a legal highway existed at the point in question across the company's right of way. Evidence showing that an order was once made by the town authorities purporting to lay out such a highway, but that no notice of the pendency of their proceedings was ever given to the company; that no damages were ever offered or paid; and that there was no release of damages, does not establish such a highway. *Hunter v. C., St. P., M. & O. R. Co.* 613

5. Defects in laying out a highway across the right of way of a railroad company are not cured, under the provisions of sec. 1295, R. S. 1878, by the opening and working of such highway, if within the

three years specified in such section the railroad company fences across the same and puts in gates. *Ibid.*

HOMESTEADS. See CONSIDERATION. MECHANICS' LIENS, 4.

HOUSE OF CORRECTION. See HABEAS CORPUS, 1.

HUSBAND AND WIFE.

See CONSIDERATION. DIVORCE. JURISDICTION, 2.

A note and mortgage running to a husband and wife are held by them in joint tenancy, and upon the death of one go to the survivor, and not to the executor of the deceased for the payment of his debts. *Fiedler v. Howard,* 388

INDIANS. See JURISDICTION, 1.

INFANTS. See CLOUD ON TITLE.

INJUNCTIONS.

See APPEAL, 14. EXCISE.

1. A motion to dissolve a preliminary injunction and require the plaintiff to furnish additional security may, in the discretion of the court, be brought to a hearing without waiting to enable the plaintiff to procure an affidavit to be used only on the question of the sufficiency of the security, where it appears that he will not be prejudiced thereby. *Tiede v. Schneidt,* 201

2. Where in an action against the owner of an establishment for converting dead animals into marketable products, and a city with which he had contracted to dispose of all dead animals found in its streets, to enjoin the operation of said establishment as being a nuisance, the equities of the complaint were fully met and denied by the answer of such owner, a motion to dissolve a preliminary injunction was properly, in the discretion of the court, heard and decided without waiting for the city to answer. *Ibid.*

3. The fact that the application for the injunction was supported by nine affidavits did not render it an abuse of discretion to dissolve the injunction, where there were numerous affidavits on the other side. *Ibid.*

4. A court of equity will not lend its aid to prevent an illegal act, such as the violation of sec. 1418, R. S. 1878, prohibiting the keeping of slaughter houses upon the banks of any running stream, or depositing therein any dead animal, etc., merely because it is an illegal act, where no injury to property or property rights is alleged. *Ibid.*

INSANITY. See DEEDS, 4.

INSOLVENCY.

Our law relating to assignments by insolvent debtors and their discharge (ch. 334, Laws of 1897) cannot operate to vacate judgments, nor to dissolve attachments, levies, or garnishments, in the courts of other states. *Guldemann v. Lerdall,* 495

INSTRUCTIONS TO JURY.

See APPEAL, 42, 43, 45, 49, 53. FRAUDULENT CONVEYANCES, 3. LIBEL, 2. NEGLIGENCE, 9. PRACTICE, 5.

To instruct a jury that "if a witness has sworn falsely as to any material matter you are at liberty to disregard his entire testimony," is erroneous, if not qualified by such a clause as "unless such testimony was corroborated by other credible evidence." *Bratt v. Swift,* 579

INSURANCE.

See APPEAL, 47, 49.

1. The requirement of an accident insurance policy that *immediate* notice shall be given of "any accident and injury for which a claim is to be made," applies as well to the case of an accident resulting in death as to one resulting only in disablement. *Foster v. Fidelity & Casualty Co.* 447
2. "Immediate" in such requirement means within such convenient time as may be reasonably necessary under the circumstances. Where the alleged accident occurred August 31, the death occurred September 5, and the beneficiary had satisfied herself of the facts as early as September 17, a notice given by her October 17 cannot be considered "immediate." *Ibid.*
3. A waiver of the condition as to the time within which proofs of death are to be furnished before action may be proved on the trial though not pleaded. *Ibid.*
4. Evidence that after notice had been given to the company there was some subsequent correspondence between it and the plaintiff's attorneys, and additional proofs were received and retained by the company, if admissible at all, could be received only to show the fact of waiver and that the conditions of the policy as to furnishing proofs had been thus substantially complied with, and, even if sufficient for that purpose, was not admissible as substantial proof of any fact as to the accident or the cause of the death. *Ibid.*
5. To allow the physician who treated the deceased, in an action upon an accident policy for his alleged accidental death, to answer the question, asked on his direct examination: "State now whether, in your judgment, his death was occasioned by those injuries, from all the evidence you had before you there at that time," was error. His opinion should be based either on his examination of the case or upon a proper hypothetical question. *Ibid.*
6. The evidence in this case is *held* insufficient to sustain a verdict to the effect that the death of the insured was the result of accident, independently of all other causes. *Ibid.*
7. A stipulation in an insurance policy limiting the time within which an action may be commenced thereon to a period shorter than that allowed by the statute of limitations, is valid and binding upon the parties, provided such time is not so short as to be unreasonable or the insurer has done nothing to induce delay. *Griem v. Fidelity & Casualty Co.* 530
8. The term "legal proceedings" in a stipulation in such policy that "legal proceedings for recovering hereunder may not be brought

unless begun within six months" after the death of the insured, etc., means the commencement of an action on the policy. *Ibid.*

9. Under a policy insuring a person against bodily injury sustained by external, violent, and accidental means, with a provision for payment to a beneficiary or beneficiaries in case of death from such injuries within ninety days therefrom, independently of all other causes, and with a condition that the liability of the assurer shall not extend to injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, *held*, that death caused by blood poisoning from the effects of the absorption into the system of septic poison evolved by the propagation of germs in cotton inserted by a dentist in wounds caused by the removal of teeth from the mouth of the deceased, to stop hemorrhage, is within the condition and creates no liability under the policy. *Kasten v. Interstate Casualty Co.* 73

10. The contract of membership between defendant and the Wisconsin Odd Fellows' Mutual Life Insurance Company contained a promise on the part of the former to pay assessments, made according to the charter and by-laws of the company, which provided, in substance, as follows: Whenever the secretary of the company shall deem it necessary to replenish the policy fund, he shall make an assessment upon the members of the company by the entry of an order in a book to be kept for that purpose. Within twenty days thereafter he shall notify the members in writing of such assessment. Each member shall be bound by the notice from the time of its deposit in the post office, or delivery to, or the leaving of it with, him, and he shall thereby become liable to pay the assessment within sixty days from the date of the notice. In case of a failure to pay any such assessment within such time, the defaulting member shall forfeit all right under his certificate, and the same shall be void as to the company. Defendant failed to pay an assessment duly levied and noticed to him, within the time required as aforesaid. Other assessments were made and duly noticed before the expiration of such time, and still other assessments were made and noticed thereafter. *Held:*

(1) That the making of the assessment and giving notice thereof, to replenish the policy fund,—not the death of the member,—fixed the liability of the defendant under his contract.

(2) That he is liable for all assessments made and of which he was duly notified before his membership ceased, by reason of failure to pay an assessment within sixty days, as required by his contract, but not for the assessments made thereafter. *Fulton v. Stevens,* 307

11. Under the provisions of sec. 1955, R. S. 1878, the commissioner of insurance may revoke the existing license of any foreign insurance company to transact business in this state, for its failure or refusal to pay the lawful license fee for the license of a previous year. Such a failure or refusal is a continued failure to comply with the statute. CASSODAY, C. J., dissents. *Travelers' Ins. Co. v. Fricke,* 367

12. The state is not estopped, by the failure of its officers to require compliance with the law at the proper time, from afterward insisting upon it; nor, the law being plain, can the doctrine of practical construction be applied to such action. *Ibid.*

13. The license fee is not a tax, but a condition precedent to the plaintiff company's enjoying the privilege of doing business in this state,

and by accepting such license and doing business under it the company bound itself to comply with the law. *Ibid.*

14. An oral agreement by an insurance agent with a person to whom he is issuing a policy that he will never suffer the insurance to lapse, but will give notice when it is about to lapse, and will renew the insurance either in the same or in some other company represented by him, is not binding upon the company which issued such policy, unless the agent was acting within his actual or apparent authority for such company and it was so understood by the insured, or the contract was afterward ratified. It is the contract of the agent in his personal capacity. *Wood v. Prussian Nat. Ins. Co.* 497

INTEREST.

Unpaid license fees bear legal interest from the various dates when they ought to have been paid. *Travelers' Ins. Co. v. Fricke,* 367

JOINDER of causes of action. See CLOUD ON TITLE, 8. PLEADING, 8, 9.

JOINT TENANCY. See ATTORNEY AND CLIENT. HUSBAND AND WIFE.

JUDGE.

See ESTATES OF DECEDENTS, 7.

In order to render a judge of a municipal court liable in damages for erroneously assuming jurisdiction to pass judgment upon and commit to prison a person brought before him for a crime of which he had no jurisdiction except to examine and hold to bail or commit for trial, such judge must have acted wilfully, maliciously, or corruptly in exercising such jurisdiction. *Robertson v. Parker,* 652

JUDGMENTS. See DIVORCE, 1, 2. FORECLOSURE. INSOLVENCY. RAILROADS, 2 (4). RES ADJUDICATA.

What appealable. See APPEAL, 1–3.

JUDICIAL NOTICE. See EVIDENCE, 5.

JURISDICTION.

See CORPORATIONS, 3. CRIMINAL LAW, 2. HABEAS CORPUS. JUDGE.

1. In the absence of any federal statute or treaty to the contrary, a state court has jurisdiction of an action on contract in favor of a white man against an Indian belonging to a tribe and a particular reservation. *Stacy v. La Belle,* 520

2. *It seems* that a municipal judge, invested by ch. 278, Laws of 1895, with jurisdiction "to hear, try and determine all criminal actions arising in said county, not punishable in state prison," has no jurisdiction to try and pass judgment upon a person charged, under sec. 4587c, S. & B. Ann. Stats., with abandoning and unreasonably refusing and neglecting to provide for his wife, but his power is limited to holding the accused to bail or committing him for trial. *Robertson v. Parker,* 652

JURY.

See APPEAL, 40. COURT AND JURY. DAMAGES, 2. INSTRUCTIONS TO JURY. MECHANICS' LIENS, 5. PRACTICE, 1.

1. A person is not disqualified to sit as a juror in an action against a street railway company by the mere fact that he is in the employ of another street railway company, if it does not appear that his relations to such company will be likely to bias his judgment. *Kohler v. West Side R. Co.* 33
2. Jurors, drawn and obtained for a term of court according to the law existing when so drawn and obtained, remain jurors for such term unless excused or discharged by the court, regardless of any change in the law for obtaining jurors made subsequent to such drawing and before the commencement of such term. *Ray v. Lake Superior T. & T. R. Co.* 617

LAND CONTRACT. See FORECLOSURE. WAIVER, 3, 4.

LANDLORD AND TENANT.

See RAILROADS, 2.

1. Under the provisions of sec. 2187, S. & B. Ann. Stats., that if a tenant for a year or more holds over after the expiration of his term he may be considered a tenant from year to year, and that such tenancy may be terminated at the end of any year after the expiration of said term by giving not less than thirty days' prior written notice, such tenancy can be so terminated only at the end of some year after the expiration of the term. *Peehl v. Bumbalek,* 62
2. A tenant under a lease for two years, with the privilege of three more if all are agreed, will be deemed to have renewed for the whole three years if he holds over after the expiration of his term and continues to pay rent. *Ibid.*

LEASE. See LANDLORD AND TENANT.

LIBEL.

1. In an action for the publication of a libel in a newspaper, an article on the editorial page of such paper stating the extent of its circulation is admissible in evidence, as bearing upon the question of the damages caused by such publication. *Pellardis v. The Journal Printing Co.* 157
2. Where the answer in such action admitted that the libelous article referred to the plaintiff, though by an erroneous name, it was not error to charge the jury that while such article referred to the plaintiff, the error in the names would have a bearing upon the question of its publicity and consequently of the amount of the damages. *Ibid.*
3. In an action for libel, actual damages cannot be reduced by proof of mitigating circumstances, and the admission of evidence of such circumstances is therefore erroneous. *Ibid.*
4. A verdict of $450 damages, in an action for a libel published in a newspaper having a large circulation, charging the plaintiff with the crime of counterfeiting, *held* not excessive. *Ibid.*

LICENSE.
To do insurance business. See INSURANCE, 11–13. STATUTE OF LIMITATIONS, 1.
To sell liquors. See EXCISE.

LIENS. See ATTORNEY AND CLIENT, 2. GUARANTY. MECHANICS' LIENS.

LIFE INSURANCE. See INSURANCE, 9, 10.

LIMITATION OF ACTIONS. See INSURANCE, 7, 8. STATUTE OF LIMITATIONS.

LIMITATION of indebtedness. See COUNTIES, 2–6.

MANDAMUS.

1. When an official act requires the exercise of judgment or discretion on the part of public officers, *mandamus* will not lie to compel performance thereof. *State ex rel. Gericke v. Mayor and Common Council of Ahnapee,* 322

2. Although it is the duty of city officials, under sec. 1223, R. S. 1878, to construct and keep in repair bridges in their respective municipalities, and they have power, under secs. 1318, 1347, R. S. 1878, to levy taxes for that purpose, yet where a city has not sufficient funds in its treasury to repair a bridge, lawfully applicable thereto, and it appears to be a matter of discretion on the part of the city whether to repair the old bridge or to build a new one, *mandamus* will not lie to compel it to repair the old bridge. *Ibid.*

MARRIAGE AND DIVORCE. See RELEASE.

MARRIED WOMEN. See HUSBAND AND WIFE.

MARSHALING ASSETS. See GARNISHMENT, 3.

MASTER AND SERVANT.

See DAMAGES, 1, 4. MUNICIPAL CORPORATIONS, 10, 11. NEGLIGENCE, 1, 2, 4–9.

1. Where an employer, for breach of duty, terminates a contract of employment with his employee, especially if the employment be one requiring the exercise of judgment and discretion, unless such breach be such as to evince moral turpitude or manifest injury to the employer's interests, it does not *per se* constitute a legal justification for the employer's conduct, and the issuable fact, therefore, under such circumstances, is not whether there was a breach of duty, but whether there was a breach of duty constituting reasonable ground for terminating the contract of employment. *Schumaker v. Heinemann,* 251

2. An employee who has been wrongfully discharged by his employer before the expiration of the contract period may wait until after such time, and then sue and recover the amount which he would have earned under such contract, less what he might have, in the meantime, earned elsewhere. *Winkler v. Racine Wagon & Carriage Co.* 184

3. In an action by an employee to recover damages for such wrongful discharge, the burden of proving in mitigation of damages, that the plaintiff could have obtained employment elsewhere, is upon the defendant. *Ibid.*

MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS.

1. A pastor of a church who transacted the entire business of having the church building repaired and remodeled, with the knowledge of the church corporation and its trustees, without any objection on the part of either, must be deemed their agent in respect to such matter, upon whom, under sec. 3315, R. S. 1878, service of a notice of a subcontractor's lien may lawfully be made. *Moody & Meckelburg Co. v. Trustees of M. E. Church,* 49

2. Under sec. 3315, R. S. 1878, relating to subcontractors' liens, notice in writing of the claim for a lien must be served on the owner or his agent within sixty days of the performance of the last work or furnishing of the last material, or upon the agent of the owner if to be found in the county: otherwise, the notice may be filed in the office of the clerk of the circuit court for the county, and if service of notice be alleged, the action cannot be sustained against objection, by proof that it was filed and that the circumstances existed making such filing effectual to preserve the lien. *Charles Baumbach Co. v. Laube,* 171

3. Where a school district, in a contract for the erection of a school house, agreed with the contractor to pay all bills for materials upon the indorsement of such contractor in the form of an order, and such payments were to be accepted as payments on the contract, *held,* that there was no privity of contract between the school district and the furnisher of materials: that the district had assumed no obligation to pay bills for materials except on the order of the contractor, and then only to the extent of the contract price; and that it did not, by making advancements to such materialman on the verbal order of the contractor before any bill was presented, waive the requirements of the contract, or give such materialman any right of action against it. *Yahr v. Joint School Dist.* 281

4. In an action to enforce the mechanic's lien given by sec. 3314, R. S. 1878, upon forty acres of land according to government subdivision, on account of buildings erected on the south part thereof, the defendant cannot claim that, because his dwelling and buildings constituting his homestead are situated on the north part of said forty-acre tract, the court shall carve out a forty acres different from the government subdivision, composed in part of the land on which the buildings are situated, to be subject to the lien. *Darling v. Neumeister,* 426

5. The statutory right to a jury trial in an action to enforce a mechanic's or materialman's lien, under sec. 3323, R. S. 1878, is conditional upon a demand being made therefor at or before the time of the commencement of the trial, specifying the particular issue or issues of fact upon which a verdict is required; a failure to make such demand constitutes a waiver of the statutory right. A subsequent submission of issues on the request of either party, against the objection of the other, the same as if the demand, with proper specification of the issues, was made at the proper time, is reversible error. *Siebrecht v. Hogan,* 437

6. A subcontractor's lien cannot, to the prejudice of the proprietor, be extended so as to cover for work not included in the principal contract as originally drawn or subsequently modified, or to damages for mistakes or negligence of the principal contractor, or breaches of contract on his part. *Ibid.*

7. The subcontractor's authority to bind the proprietor's property is referable always to the principal contract. To that extent, but no further, the proprietor is deemed, by force of the statute, to authorize the principal contractor to bind such proprietor's property under the lien laws. That authority does not extend to any claim that is not lienable between the principal contractor and the proprietor. *Ibid.*

MENTAL CAPACITY. See DEEDS, 4.

MISTAKE. See GUARANTY. LIBEL, 2.

MITIGATION of damages. See LIBEL, 3. MASTER AND SERVANT, 8.

MONEY HAD AND RECEIVED. See FRAUD, 2, 3.

MORTGAGES.

See CHATTEL MORTGAGES. DEEDS, 6. FORECLOSURE. GUARANTY.

The indorsement of a note secured by a mortgage, and delivery of such note and mortgage by the owner to another for the purpose of conveying the same to such other, but without any written assignment or notation of the fact of record, passes to such other the mortgage as an incident of the debt, and his possession thereof constitutes constructive notice of his interests therein, binding on any person who deals with the former owner in regard to the property, so that such person cannot claim a *bona fide* interest in the securities, hostile to the first transferee, by reason of the fact of there being no notice of such first transfer of record. *Fred Miller Brewing Co. v. Manasse,* 99

MUNICIPAL CORPORATIONS.

See APPEAL, 19. CONSTITUTIONAL LAW. COUNTIES. COUNTY BOARDS. CRIMINAL LAW AND PRACTICE, 1. EVIDENCE, 5. EXCISE. HIGHWAYS. MANDAMUS, 1, 2. MECHANICS' LIENS, 3. RAILROADS, 1, 2.

1. Where a city charter requires assessments for street improvements to be made according to the benefits accruing to the several lots, a report of the board of public works of such city that they have assessed the lots benefited by such improvements according to benefits shows a compliance with the charter, although it may also show that the apportionment to lot owners was according to the number of front feet owned by them respectively, abutting on the street. An apportionment according to front feet is not necessarily erroneous. *Hayes v. Douglas Co.* 92 Wis. 429, distinguished. *Hennessy v. Douglas County,* 129
2. That an assessment was ordered only on property fronting, abutting, and adjacent to a certain street for improvements thereon, does not, as a matter of law, unduly limit the district benefited, in the absence of proof that there was any outside of that limit which would be benefited. *Ibid.*
3. The charter of the city of Superior does not require the published notice of the determination of the amount of assessments for street improvements to be made against lands benefited to have any particular address. It will be sufficient if addressed to all whom it may concern. *Ibid.*
4. Proceedings for levying sewer assessments in accordance with provisions in the city charter requiring the publication of notices

showing a plan of sewerage; the order of the council for the construction of the sewer when the contract therefor has been let; the opportunity given to the lot owner to pay the assessment or have bonds issued; and the placing of the assessment on the tax list, are not subject to objection as being a taking of property without due process of law. *Ibid.*

5. Assessments for the building of sidewalks are valid if made in pursuance of the city charter, although that does not provide for the giving of any notice of the proceedings to lot owners except the annual entry in the tax rolls. *Ibid.*

6. In respect to lots to be assessed for street improvements, the term "adjacent" means "lying near, close to, or contiguous, but not actually touching," while the term "adjoining" indicates that they are "so joined or united that no third body intervenes." *Ibid.*

7. There can be no recovery against a town or city for injuries caused by a runaway or uncontrollable horse. *Ritger v. City of Milwaukee,* 190

8. Where, in an action for an injury received by reason of an obstruction in a street, the evidence shows that the injury was sustained while plaintiff's horse was running away, such running away must be deemed the proximate cause of the injury. *Ibid.*

9. Where, in such action, the evidence was clear that the driver had more than momentarily lost control of the horse at the time of the injury, and there was no evidence which could sustain a verdict in favor of the plaintiff, a nonsuit was properly granted. *Ibid.*

10. The effect of a city ordinance which fixes eight hours as a full day's work for city employees is to give such employees an option either to refuse to work over hours, or to demand extra pay for work over that time; but in order to entitle them to recover extra pay for work done over time there must have been a previous agreement therefor. *Vogt v. City of Milwaukee,* 258

11. Where a city ordinance fixing eight hours as a full day's work for city employees provided that no city official should employ workmen overtime unless upon the recommendation and order of the health commissioner, *held,* that one who entered the employment of such city without any express agreement as to his wages or his hours of work, and without any action on the part of the health commissioner, and for the first forty-three days worked eight hours per day, and during the remainder of the year worked three shifts of eight hours each in every two days, and received and accepted his wages at the same rate per day for all the days he was employed, upon pay rolls signed by him which stated the whole number of days, without protest to any official having authority to act in the matter, must be deemed to have estopped himself from afterward claiming payment for the extra hours so worked by him. *Ibid.*

12. A city of this state has no power to accept a privilege, granted to it by the legislature of another state, of constructing a highway over territory belonging to such other state, subject to liability for all damages caused by the improper construction or want of repair of such highway, and therefore it cannot be held liable for an injury caused by defects in a highway so constructed, occurring outside the state. *Becker v. City of La Crosse,* 414

MUNICIPAL JUDGE. See JUDGE. JURISDICTION, 2.

MUTUAL BENEFIT SOCIETY. See INSURANCE, 10.

NEGLIGENCE.

See APPEAL, 42, 43. CORPORATIONS, 2. HIGHWAYS, 2, 3. MUNICIPAL CORPORATIONS, 7, 8, 12. RAILROADS, 2–4.

1. Where the evidence showed that the window in defendant's office, where employees were usually paid, and the catch for fastening it, were in perfect condition, so that the window could not fall if the catch was properly fastened, and that when such window had been raised by the defendant's servant, that he might receive a check presented by the plaintiff, it fell upon and injured the plaintiff's hand resting on the window ledge, a presumption of negligence arises from the very happening of such accident. *Carroll v. C., B. & N. R. Co.* 399

2. Where, in such a case, the plaintiff, was not in the employ of the defendant, but was present for the purpose of obtaining the pay of an employee who had quit its service some time before, he cannot be deemed a co-employee with the servant who raised the window. *Ibid.*

3. Although a street-car conductor may have been guilty of negligence in suddenly starting his car without warning a passenger who was about to alight, thereby proximately causing his injury, yet, if such passenger failed to exercise ordinary care in making the attempt, he cannot recover therefor. *Kohler v. West Side R. Co.* 33

4. For a railroad company to leave a ditch, ten inches wide and eight inches deep, beneath its track in its yard, open at the side of its track at a place where switchmen would naturally walk in the discharge of their duties, such ditch being constructed partly to allow free play to the switch rod and partly to drain the yard, does not, as a matter of law, constitute negligence on its part; but whether it did so or not, in a particular case, is a question for the jury upon the evidence. *Hennesey v. C. & N. W. R. Co.* 109

5. Where, in an action against a railroad company for the death of a switchman who had worked for some time in and was familiar with its yard, caused by his falling into an open ditch located under its track between two ties and extending outside the track, while walking between and attempting to uncouple cars, there was evidence showing that the ditch in question was substantially different from the openings at the other switches and the danger to be apprehended was greater in degree as well as different in character, *held*, that it could not be said as a matter of law that he assumed the risk. MARSHALL, J., dissents. *Ibid.*

6. It is not, as a matter of law, contributory negligence for a switchman to walk between cars which are moving slowly, for the purpose of uncoupling such cars, in a railroad yard where that method has been universal and has been practiced for a long time with the knowledge and approval of the yardmaster, and there was no rule or regulation to the contrary. *Ibid.*

7. Where, in an action against a railroad company for the death of a switchman caused by his stepping into a ditch in its yard, although the general question of contributory negligence was submitted, yet the jury were not instructed that an assumption of risk was a species of contributory negligence, and that if the deceased assumed the risk of unusual danger he was, in law, guilty of contributory negligence, the question whether a person of ordinary intelligence, with the experience of the deceased, in the ex-

ercise of ordinary care, should have observed the condition of the track before the day of the injury, and so have known the danger, should, on request, have been submitted to the jury as a separate question. MARSHALL, J., dissents. *Ibid.*

8. In such an action, where no one saw the injury and the circumstances in evidence might well lead to different inferences in the minds of reasonable men, the question whether the death was the result of an unaccountable accident should, on request, have been submitted to the jury. *Ibid.*

9. An instruction defining ordinary care as "such care as the ordinary person uses in the transaction of the ordinary affairs of life" is certainly inaccurate, if not positively erroneous. *Ibid.*

10. The contributory negligence of the driver of a private conveyance in which another person is voluntarily riding at the time of his injury is imputable to the person so injured, and will prevent a recovery by him for the injury sustained. *Ritger v. City of Milwaukee,* 190

11. For a person approaching a railroad crossing on a diagonal street, in a closed vehicle containing noisy articles, the rear of such vehicle being towards a coming train which he knew was about due, not to stop and look out for such train after he came nearer than eighty feet to the track, though at the point where he did stop he could not see it when more than forty rods away, while at a distance of sixty feet from the track he might have seen it when 139 rods away, is contributory negligence on the part of such person, which will prevent a recovery for an injury by collision at such crossing. *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, distinguished. *Schneider v. C., M. & St. P. R. Co.* 378

NEWSPAPER. See LIBEL. NOTICE.

NEW TRIAL.

See APPEAL, 29, 30, 53.

A new trial will not be granted on the ground of newly-discovered evidence if that is merely cumulative or impeaching. *Knopke v. Germantown F. M. Ins. Co.* 289

NONRESIDENTS. See ATTACHMENT, 3.

NONSUIT. See APPEAL, 33. MUNICIPAL CORPORATIONS, 9.

NOTICE.

See APPEAL, 6-9. HIGHWAYS, 4. INSURANCE, 1, 2, 10. LANDLORD AND TENANT, 1. MECHANICS' LIENS, 2. MORTGAGES. MUNICIPAL CORPORATIONS, 4, 5.

Although secs. 1130, 1131, S. & B. Ann. Stats., merely require that the delinquent tax list shall be published in a newspaper which has been published continuously for two years, and though the county board are authorized by sec. 675 to order its publication in a newspaper published in any other than the English language, when they shall deem it necessary, provided twenty-five per cent. of the population of that county are of a nationality not speaking the English language and have a newspaper published in their own language, yet that statute required such notices also to be published in a newspaper "published in the English language as pro-

vided by law;" and in the absence of any order by the county board, the publication of such list in a German newspaper, though in the English language, is not legal, and such paper, though making the lowest bid, is not entitled to the contract. *Wakeley v. Nicholas*, 16 Wis. 588, and *Kellogg v. Oshkosh*, 14 Wis. 623, distinguished. *State ex rel. Goebel v. Chamberlain*, 503

NUISANCE. See INJUNCTION, 1–3.

OFFICERS. See CONSTITUTIONAL LAW, 4. CORPORATIONS, 3. JUDGE. MANDAMUS.

ORDINANCES. See CONSTITUTIONAL LAW, 5, 6. CRIMINAL LAW, 1. EVIDENCE, 5. MUNICIPAL CORPORATIONS, 10, 11.

PARENT AND CHILD. See EQUITY, 4–6.

PARTNERSHIP. See CHATTEL MORTGAGES, 1, 2. EVIDENCE, 9.

PARTIES. See CLOUD ON TITLE, 2. EJECTMENT, 3. EQUITY, 1, 2. ESTATES OF DECEDENTS, 4, 7.

PARTITION. See CLOUD ON TITLE, 4.

PHYSICAL EXAMINATION. See PRACTICE, 2, 3.

PHYSICIANS AND SURGEONS. See EVIDENCE, 6, 7. INSURANCE, 5. PRACTICE, 2, 3.

PLEADING.

See APPEAL, 19, 24, 28, 35. COUNTY BOARDS (6). DIVORCE, 1. EJECTMENT, 2. GARNISHMENT, 5. INJUNCTIONS, 2, 4.

1. If a defendant pleads the same matter both in abatement and in bar of the action, the latter plea overrides the former. *Crowns v. Forest Land Co.* 103
2. An answer in a foreclosure action which alleges that, as between the nominal mortgagee, in whose name the action is brought, and the real party in interest, there was no consideration for the note and mortgage, presents no issuable facts, and may properly be stricken out as frivolous. *Ibid.*
3. So, also, an answer alleging that the note and mortgage in suit were taken in the name of the plaintiff for the purpose of enabling the real owner to evade taxation on account thereof, presents no ground for a discharge of the mortgagor from his just debt. *Ibid.*
4. Performance of conditions precedent must be pleaded, and when performance of one condition is required and the circumstances are such as to require performance of another in lieu of it, not alleged, evidence to support such required performance, if objected to, should be rejected and the complaint dismissed unless amended so as to cure the defect; though if the evidence be received without objection, the complaint may be so amended on the trial, or the defect ignored on appeal, if raised there for the first time. *Charles Baumbach Co. v. Laube*, 171
5. A complaint which alleges the contract by which the plaintiff was employed, and his wrongful discharge before the expiration of the contract period, states a cause of action for a breach of the contract, and the averment that there is now "due the plaintiff by virtue of such contract" a certain sum, naming the balance which he would have earned under the contract, does not make it an action for wages. *Winkler v. Racine Wagon & Carriage Co.* 184

6. Where the objection to a complaint is raised *ore tenus* at the trial, the complaint should be construed liberally and with a view to substantial justice, and not so as to defeat it by undue technicality. *Ibid.*

7. A complaint in an action for damages claimed to have been caused by the unsafe condition of a highway, which merely describes such highway as a graded way, not to exceed nine and one-half feet wide on the surface, with an unfenced or unguarded ditch about two and one-half feet deep on each side, and alleges that, while traveling on such highway with a loaded sleigh drawn by horses, the sleigh with its load slued into the ditch on one side, whereby it was overturned, causing the injuries complained of, does not state a caues of action, because it does not charge that the alleged defective condition of the road was the cause of the accident or had anything to do with it. *Bodah v. Town of Deer Creek,* 509

8. Upon a demurrer *ore tenus* to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, the complaint will be construed liberally with a view to substantial justice, and all reasonable presumptions will be allowed in its favor. The objection that two causes of action have been improperly united cannot be raised by such a demurrer. *Phillips v. Carver,* 561

9. Under the provisions of sec. 2654, R. S. 1878, the objection that several causes of action have been improperly joined is waived if not taken by demurrer or answer. *Ibid.*

POLICE OFFICER. See CRIMINAL LAW, 1.

PRACTICE.

See APPEAL. ATTACHMENT, 1, 4. CORPORATIONS, 3. COSTS. DAMAGES, 4. DIVORCE, 1, 2. ELECTION OF REMEDY. EQUITY, 6. ESTATES OF DECEDENTS, 3–7. EVIDENCE. EXCISE. FORECLOSURE. FRAUD, 3. FRAUDULENT CONVEYANCES, 3–5. GARNISHMENT. HABEAS CORPUS. INJUNCTIONS. INSOLVENCY. INSTRUCTIONS TO JURY. INSURANCE, 3–6. JURISDICTION. JURY. LIBEL. MASTER AND SERVANT, 2, 3. MECHANICS' LIENS, 2, 5. MUNICIPAL CORPORATIONS, 9. NEGLIGENCE, 7–9. NEW TRIAL. PLEADING. RAILROADS, 2 (4). RES ADJUDICATA. VERDICT. WAIVER, 1–4.

1. It is not essential, under the provision of sec. 2858, R. S. 1878, authorizing the court to direct the jury to find upon any particular question of fact, that the question submitted should cover all the issues in the case. *Carroll v. C., B. & N. R. Co.* 399

2. In an action for personal injuries the defendant has, in the absence of statute, no absolute right to have a personal examination of the injured party by physicians, but such right rests in the sound discretion of the court. *O'Brien v. City of La Crosse,* 421

3. Where, in an action for an injury to the plaintiff's bladder, she, at defendant's request, submitted to a physical examination by defendant's experts to a certain extent, but refused to permit the introduction of a catheter on the ground that it might endanger her health, and her physician testified that he had objected because it might have that effect, *held,* that it was not an abuse of discretion to refuse to order such further examination. *Ibid.*

4. A party who desires a particular finding to be made by the court should call its attention thereto, and if he fails to do so and the

findings actually made are correct and no different ones are required by law, he can take no advantage of the neglect of the court to make such finding. *Darling v. Neumeister,* 426

5. Where a special verdict is required, if any instructions are given as to where the burden of proof rests, the jury should be so informed that they will understand the subject as to each material fact in issue. A general instruction that the burden of proof is where the weight is, and that the general rule that the burden of proof is on the plaintiff does not apply, *held* to be error. *Siebrecht v. Hogan,* 437

PRESCRIPTION. See EASEMENTS, 1–3.

PRESUMPTIONS. See APPEAL, 28, 49. DEEDS, 5. NEGLIGENCE, 1.

PRIMARY LIABILITY. See RAILROADS, 2.

PRIVITY of contract. See MECHANICS' LIENS, 3.

PROCESS, service of. See CORPORATIONS, 3.

PROMISSORY NOTES. See MORTGAGES.

PROMISE TO MARRY. See RELEASE.

PROXIMATE CAUSE. See APPEAL, 52. HIGHWAYS, 2. MUNICIPAL CORPORATIONS, 8.

PUBLICATION.
Of delinquent tax list. See NOTICE.
Of laws. See CONSTITUTIONAL LAW, 5, 6.
Of libel. See LIBEL.
Of notice of special assessment. See MUNICIPAL CORPORATIONS, 3, 4.

RAILROADS.

See APPEAL, 23. COUNTIES. HIGHWAYS, 4, 5. NEGLIGENCE, 3–9, 11.

1. An electric railway for the carriage of passengers between cities, which is constructed and operated upon a country highway, is an additional burden upon such highway, and its proprietors cannot, even with the permission of the town authorities granted for the sole purpose of enabling them to do so, cut down the highway so as to seriously impair the rights of an abutting owner to access to his lot, without his consent or the payment of compensation to him. *Zehren v. Milwaukee Electric R. & L. Co.* 83

2. The street railway company in the defendant city so constructed and maintained its railway track on one of the streets of such city as to render such street defective and dangerous for public travel. While such condition existed, Elihu Colman, with knowledge of the facts, purchased the railway track and left the same in possession of the railway company under an option to purchase the property, but without any agreement binding the railway company to remedy the defective condition of the street. While such condition of things existed, the plaintiff, lawfully traveling on such street at the point of danger, without fault on his part, was injured by reason of such condition. Plaintiff thereafter gave due notice of his injury to the defendant city, and thereafter prosecuted an action against the railway company to judgment, for his damages. The company, pending the suit, notified the defendant herein of the action, in order that it might defend the same. After exhausting all legal remedies against such company, plaintiff sued the defendant city, setting up the proceedings in the first suit and the fact of failure to collect the damages from the rail-

way company after exhausting all legal remedies to that end. In the second suit it was claimed that the defendant city was bound by the judgment in the first suit, as to the defective condition of the street, the happening of the accident, and the amount of damages. Defendant pleaded and insisted, among other things, that Elihu Colman was primarily liable for the damages, and that the exhaustion of all legal remedies against him was a condition precedent to the right of plaintiff to proceed against the defendant city. Plaintiff recovered judgment, but for a less sum than in the first suit, the court holding that Colman was not primarily liable and that defendant was not bound by the former proceedings. On appeals by both parties, *held:*

(1) That Colman, and the railway company as well, were primarily liable to plaintiff, and that the exhaustion of all legal remedies as to both was a condition precedent to the right of plaintiff to proceed against the city under the charter thereof, which provides that in such cases the city shall not be liable till all legal remedies shall have been exhausted to collect the damages from the person or corporation whose wrong or neglect produced or caused the defective condition of the street.

(2) That the right to recover of the city is a creature of the statute, hence the legislature may grant the right, take it away, or make the exercise of it contingent upon the performance of such conditions as in its wisdom may be deemed best, and without any warrant for holding that the law in that regard is unreasonable. Such legislation, being in derogation of the common law, should be construed most favorably to the public corporation, and not the claimant for damages.

(3) If property, when in such defective condition as to be dangerous to persons lawfully in the vicinity thereof, be purchased by a person with knowledge of the facts, who leases it to another, especially if the lease does not contain a clause requiring the lessee to remedy the defects, and a person so lawfully in the vicinity of such danger, but having no connection whatever with such lessee, be injured thereby, such lessor is liable to such injured party; he cannot escape liability from the mere fact of the lease to, or possession by, such other person.

(4) The doctrine that where a person against whom suit is brought to recover damages is entitled to indemnity from another in case of being compelled to pay such damages, such other is bound by the judgment against such person if he be notified of the pendency of the suit and has an opportunity to defend against the same, does not apply to the facts of this case. The judgment against the indemnitee in such a case is binding on the indemnitor, but if the latter be first sued the judgment in a subsequent suit by the same plaintiff against the indemnitee will not affect the plaintiff as to any question litigated in such first suit. *Schaefer v. City of Fond du Lac,* 333

3. The liability of railroads, under ch. 467, Laws of 1891, for injuries to persons caused by trains running at excessive speed in cities, etc., is not absolute, but is liable to be defeated by the contributory negligence of the person injured *Schneider v. C., M. & St. P. R. Co.* 378

4. Injuries resulting from the frightening of a horse by the appearance of moving railway cars, trains, or locomotives, or the usual noises or incidents of their ordinary operation, are *damnum absque injuria. Dewey v. C., M. & St. P. R. Co.* 455

RATIFICATION. See AGENCY, 1. CORPORATIONS, 1.

REAL PROPERTY. See CLOUD ON TITLE, 1–3. DEEDS. EQUITY. MECHANICS' LIENS, 4. STATUTE OF LIMITATIONS, 2.

RELEASE.

See CONSIDERATION.

Some difficulty having arisen to prevent the marriage of the parties who were engaged, the plaintiff told the defendant that he need not marry her if he did not wish to, and later wrote to him, "If you desire a change, take it, and end the matter right here." The defendant thereupon ceased to visit the plaintiff, and, without objection on her part, courted and married another. *Held*, that plaintiff had released the defendant from his engagement. *Kellett v. Robie*, 303

RELIGIOUS CORPORATIONS. See AGENCY, 1, 3. MECHANICS' LIENS.

REMEDIES. See ELECTION OF REMEDY. EQUITY, 5, 6. FRAUD, 1. MASTER AND SERVANT, 2.

REMEDY AT LAW. See EQUITY, 2.

REPLEVIN. See RES ADJUDICATA, 2.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 7, 8. RAILROADS, 1–3.

RES ADJUDICATA.

See RAILROADS, 2.

1. The rule that a judgment in bar, or as evidence in estoppel, is binding not only as to every question actually presented and considered and upon which the court rested its decision, but every question that might have been presented and decided as well, does not apply to a different cause of action between the same parties, except as to questions shown to have been actually decided in the former action. *Wentworth v. Racine County*, 26

2. Plaintiffs began an action to recover a board bill while having in their possession some personal effects of the defendant, upon which they were entitled to a lien for such bill. Defendant replevied such effects. Plaintiffs recovered judgment in the replevin case by virtue of their lien. Such judgment was subsequently pleaded, in the action to recover the amount of the board bill, as a bar to further prosecution of that action. Plaintiffs recovered judgment nevertheless. The trial court then certified that whether the judgment in the replevin case was a bar to the prosecution of the first action was a legal question of such doubt and difficulty as to require the decision of the supreme court. *Held*, that the rule of the conclusiveness of a former adjudication has no application to the facts as against the plaintiffs. No question was decided in the first case that affected the right of plaintiffs to recover the board bill. *Rosenow v. Gardner*, 358

RULES OF COURT.
Circuit Court Rule XI, sec. 6 (Orders), 539, 542.
Supreme Court Rule VIII (Printed case), 231.
Supreme Court Rule IX (Briefs, etc.), 215, 231, 445, 446.
Supreme Court Rule XVII (Affirmance on failure to prosecute), 409, 411.

SCHOOL DISTRICT. See MECHANICS' LIENS, 3.

SEWERS. See MUNICIPAL CORPORATIONS, 4.

SLANDER. See APPEAL, 53. DAMAGES, 4.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 1–6.

SPECIAL VERDICT. See APPEAL, 41–44. NEGLIGENCE, 7, 8. VERDICT.

STATE PRISON. See HABEAS CORPUS, 1.

STATUTE OF FRAUDS. See AGENCY, 3 (C).

STATUTE OF LIMITATIONS.

1. Where the plaintiff is a foreign corporation all of the time having its residence in another state, the statute of limitations does not apply in its favor; nor is it applicable in an action in equity to prevent the insurance commissioner revoking its license. *Travelers' Ins. Co. v. Fricke,* 367

2. An open, notorious, and exclusive possession of land, claiming title and paying taxes, for twenty years before the commencement of an action therefor against the possessor creates a marketable title by virtue of our statute of limitations (sec. 4207, R. S. 1878), which a purchaser under a land contract who has stipulated for a clear and indefeasible title is bound to accept. *Nelson v. Jacobs,* 547

STATUTES. See ABATEMENT OF ACTION. APPEAL, 3–6, 13, 14, 56. ATTACHMENT, 1, 4. CLOUD ON TITLE, 3. CONSTITUTIONAL LAW, 2–8. CORPORATIONS, 2, 3. COSTS, 1. COUNTIES, 3. DIVORCE, 2. EJECTMENT, 3. ESTATES OF DECEDENTS, 5–7. EVIDENCE, 8. EXECUTIONS. GARNISHMENT, 1. HABEAS CORPUS, 1. HIGHWAYS, 5. INSOLVENCY. INSURANCE, 11. JURISDICTION, 2. LANDLORD AND TENANT, 1. MANDAMUS, 2. MECHANICS' LIENS, 2, 5. MUNICIPAL CORPORATIONS, 1–6. NOTICE. PLEADING, 9. PRACTICE, 1. RAILROADS, 3. VERDICT, 1.

STATUTES CITED, ETC.

CONSTITUTION OF WISCONSIN.

Art. II, sec. 1 - - - 418
" IV, " 31 - - 273, 275
" IX, " 1 - - - 418
" XI, " 8 - 1, 10. 15, 20
" XI, " 5 - - 273, 275

SESSION LAWS.

1856. P. & L., ch. 133, subch. III, sec. 9 - - - - 508
1864. Ch. 45 - - - - 126
1872. " 119, sec. 30 - - 387
1872. " 182 - - - - 18
1879. " 256 - - - - 126
1880. " 105 - - - 370, 371
1883. " 349 - - - - 168
1885. " 103 - - - - 92
1885. " 109 - - - 62, 65
1887. " 158 - - - - 274
1887. " 451 - - - - 168

SESSION LAWS — con.

1889. Ch. 37 - - - 417, 418
1889. " 123 - - - - 387
1891. " 124, sec. 29 - - 147
1891. " 124, " 35 - - 147
1891. " 124, " 35, subd. 28 144
1891. " 124, " 37 - - 147
1891. " 124, secs. 59, 60 - 147
1891. " 124, sec. 105 - - 149
1891. " 124, " 107 - - 148
1891. " 124, secs. 117, 119, 121 132
1891. " 124, sec. 123 - - 133
1891. " 124, " 124 - 133, 142
1891. " 124, " 125 - 133, 134
1891. " 124, " 126 - - 134
1891. " 124, secs. 142–146 (subch. XIV) 154
1891. " 124, sec. 145 - - 155
1891. " 124, secs. 147, 148 143, 144
1891. " 124, " 149, 150 - 143

STATUTES CITED, ETC.—con.

SESSION LAWS—con.

1891. Ch. 124, sec. 151 - 143, 145
1891. " 124, " 152 - 145, 148
1891. " 124, secs. 153, 154 - 146
1891. " 124, sec. 170 146, 148, 153
1891. " 124, " 173 - - 147
1891. " 263 - - - - 274
1891. " 263, sec. 6 - - 273, 275
1891. " 321 - - - - 174
1891. " 467 - - - 378, 387
1893. " 220 - - - - 619
1895. " 160 - - 273, 274, 275
1895. " 215 - - - 412, 413
1895. " 250 - - - 26, 29, 33
1895. " 278 - - - 653, 654
1897. " 175 - - - - 98
1897. " 183 - - 81, 82, 413
1897. " 334 - - - 495, 497
1897. " 380 - - - 232, 233

REVISED STATUTES OF 1858.

Ch. 124, sec. 10 - - - 508

REVISED STATUTES OF 1878.

Sections 650, 652 - - 593, 596
Section 669, subd. 6 - - 596
Sections 895–904 - - - 143
Section 927 - - - - 143
Sections 943–946 - - - 1, 13
Section 947 - - - - 1
" 948 - - - - 1, 13
" 984 - - - - 595
Sections 1034, 1036 - - - 106
Section 1056 - - - - 106
" 1220 - - - 370, 371
" 1223 - - 92, 322, 326
" 1295 - - - 613, 616
" 1318 - - - 322, 327
" 1339 - - - 363, 387
" 1347 - - 322, 327, 387
" 1418 - - - 201, 213
" 1955 - - - 367, 372
" 1968 - - - - 372
Sections 2068, 2069 - - - 393
" 2077–2079 - - - 247
Section 2187 - - - 62, 64
" 2270 - - - - 269
" 2364 - - - - 345
" 2369 - - - 344, 345
" 2603 - - - - 269
" 2610 - - - - 269
" 2647 - - 264, 269, 270
" 2654 - - 562, 573, 629
" 2732 - - - - 240

REVISED STATUTES OF 1878—con.

Section 2753 - - 163, 167, 168
" 2768 - - 163, 167, 168
" 2781 - - - 211, 212
" 2829 - - - - 299
" 2843 - - - - 177
" 2858 - - 251, 253, 403
" 2863 - - - - 282
" 2886 - - - - 629
" 2951 - - - 409, 411
" 2982, subd. 13 - 676, 680
" 2983 - - - - 427
" 2989 - - - 660, 662
" 3048 - - - 348, 355
" 3049 - - - 103, 104
" 3050 - - 539, 542, 543
" 3061 - - 540, 542–544
" 3068 - - - 540, 542
" 3069 - - - - 232
" 3069, subd. 3 - - 233
" 3075 - - - 525, 526
" 3092 - - - - 26
" 3102 - - - 264, 268
" 3223 - - - 278, 279
" 3224 - - - - 278
" 3227 - - - - 278
Sections 3237, 3239 - 276, 279, 280
Section 3314 - - - 426, 428
Sections 3314, 3347 (ch. 143) - 176
Section 3315 - 49, 52, 171, 174, 441
" 3320 - - - - 428
" 3323 - 176, 177, 437, 440
" 3409 - - 123, 125–127
" 3835 - - 512, 515, 516
" 3836 - - - 512, 516
" 4015 - - - 512, 518
" 4036 - - - 512, 515
" 4069 - - - 466, 468
" 4096 - - - 231, 304
" 4207 - - - 547, 559
" 4253 - - - 300, 302
Sections 4255, 4256 - - 300, 301
" 4282–4306 - - - 496
Section 4637 - - - - 125

S. & B. ANNOTATED STATUTES.

Section 675 - - 503, 507, 509
Sections 943, 945 - - - 12
Section 946 - - - 12, 18
" 1056a - - - - 107
" 1130 - - 503, 505, 507
" 1131 - - - 503, 506
" 1210h - - - - 130
" 1559a - - - - 546
" 1809a - - - - 387

STATUTES CITED, ETC.—con.

S. & B. ANNOTATED STATUTES—con.

Section 1810 - 387, 613, 615, 616
" 1953a - - - - 370
" 1955 - - - 376
" 2187 - - - 62, 65
" 2514 - - - - 126
" 2731 - - 235, 238, 239

S. & B. ANNOTATED STATUTES—con.

Section 2918 - - - 412, 414
" 2918, subd. 6 - - 414
" 2920 - - - 412, 414
" 4587c - - - 653, 655
" 4587d - - - - 655

STAY of proceedings. See EXCISE.

STIPULATIONS. See INSURANCE, 7.

STREET RAILWAYS. See APPEAL, 43, 44. JURY, 1. NEGLIGENCE, 3. RAILROADS, 1, 2.

STREETS. See MUNICIPAL CORPORATIONS, 1–3, 6, 8, 9.

SUBCONTRACTORS. See MECHANICS' LIENS, 1, 2, 6, 7.

SUBROGATION. See GARNISHMENT, 3.

SUPERIOR city charter. See MUNICIPAL CORPORATIONS, 1–6.

SUPREME COURT. See APPEAL TO SUPREME COURT. HABEAS CORPUS, 1.

SURETYSHIP. See CONSTITUTIONAL LAW, 7. FRAUDULENT CONVEYANCES, 2. GUARANTY.

SURVIVAL of action. See ABATEMENT OF ACTION.

TAXATION. See INSURANCE, 13. MUNICIPAL CORPORATIONS, 1–6. NOTICE. PLEADING, 3.

TAX TITLES. See AGENCY, 3.

TENANTS IN COMMON. See ATTORNEY AND CLIENT.

TITLE TO LAND. See APPEAL, 1. CLOUD ON TITLE.

TOWN BOARD. See HIGHWAYS, 1.

TOWNS. See HIGHWAYS.

TRANSACTION with person since deceased. See EVIDENCE, 8.

TRESPASS. See EASEMENTS, 5.

TRIAL. See MECHANICS' LIENS, 5. PRACTICE.

TRUSTS AND TRUSTEES. See AGENCY. BANKS AND BANKING, 1. CONSTITUTIONAL LAW, 7. ESTATES OF DECEDENTS, 7. FRAUD, 8. GARNISHMENT, 4.

VENDOR AND PURCHASER. See STATUTE OF LIMITATIONS, 2.

VERDICT.

See APPEAL, 41–44. NEGLIGENCE, 7, 8. PRACTICE, 1, 5.

1. Sec. 2858, R. S. 1878, entitles a party to an action to a special verdict on demand therefor at the proper time, but the duty of framing the questions covering the issues made by the pleadings is solely for the court. *Schumaker v. Heinemann,* 251
2. If the questions submitted to the jury cover all the issues, the refusal to submit questions covering the same issues, or any one of them, in a different form, or refusal to submit questions covering mere elements of such issues, is not error. *Ibid.*

VOLUNTARY ASSIGNMENT.

See CONSTITUTIONAL LAW, 7. GARNISHMENT, 2, 4. INSOLVENCY.

A debtor gave a chattel mortgage of nearly all his property to several creditors, with an oral understanding that one of them should take the property into possession and convert it into money for the benefit of all. *Held*, that such chattel mortgage was in effect a voluntary assignment for the benefit of creditors, and, not being executed in the manner provided by law, is void as to the other creditors. *Dahlman v. Greenwood*, 163

WAGES. See MUNICIPAL CORPORATIONS, 10, 11

WAIVER.

See APPEAL, 10, 11, 24. ATTACHMENT, 4. CHATTEL MORTGAGES, 2. CONTRACTS, 2. CRIMINAL LAW, 3. EQUITY, 6. FORECLOSURE. GARNISHMENT, 6. INSURANCE, 3. MECHANICS' LIENS, 3, 5. PLEADING, 9.

1. The consent of the respondent that an undertaking on appeal, which is found to be insufficient, may be signed by a new surety, and when so signed shall be deemed satisfactory, is a waiver of the irregularity and precludes the respondent from taking advantage thereof. *Ellis v. Lampman*, 81

2. The consent of the respondent that an undertaking on appeal, which on exception by him has been held insufficient, may be signed by a new surety, and when so signed be deemed satisfactory, is a waiver of any irregularity in that mode of procedure. *Ellis v. Allen*, 598

3. When the time for performance is made essential by the terms of a contract or by a reasonable notice to the party in default, the party who is entitled to declare the contract forfeited for a default may waive his right to do so, either expressly or by conduct which is consistent only with a purpose on his part to regard such contract as still subsisting and not ended by the default. *Phillips v. Carver*, 561

4. H., having been put in possession of land under an executory contract with W. for the purchase thereof, by which payment was required to be made in instalments and failure to pay any instalment rendered the contract void, paid some interest but made default in paying an instalment of the principal, and thereupon W. insisted that he should pay the same as soon as he possibly could. W. afterward conveyed the land to C. by a deed which expressly stated that it was "subject to a written contract with H.," which the grantee agreed to comply with, and C. entered upon the land and made improvements. In an action by P., to whom H. had assigned his contract, against C., to whom he had tendered payment of the whole amount due within a reasonable time after notice, to recover possession of the land and to compel a conveyance thereof, *held*, that the default had been waived and that he was entitled to the judgment demanded in his complaint. *Ibid.*

WARRANTY. See CONTRACTS, 2–4.

WATERS. See EASEMENTS, 2.

WILLS. See ESTATES OF DECEDENTS, 1.

WITNESSES. See EVIDENCE, 4, 8. FRAUDULENT CONVEYANCES, 4.

WORDS AND PHRASES.
Adjacent, as to liability to assessment. See MUNICIPAL CORPORATIONS, 6.
Adjoining, as to liability to assessment. See MUNICIPAL CORPORATIONS, 6.
Adverse party, in statute as to appeals. See APPEAL, 6.
Aggrieved, in statute as to appeals. See APPEAL, 9.
Allowed, as to claims in county court. See ESTATES OF DECEDENTS, 5-7.
Cost of ground, in prospectus for corporation. See FRAUD, 5.
Definite proposition, in submission for subscription to railroad. See COUNTIES, 3.
Immediate, in policy of insurance. See INSURANCE, 1, 2.
Indebtedness, in constitutional limitation. See COUNTIES, 4.
Last assessment, in constitutional limitation. See COUNTIES, 6.
Legal proceedings, in policy of insurance. See INSURANCE, 8.
Ordinary care, in charge to jury. See NEGLIGENCE, 9.
Poisoning, in insurance policy. See INSURANCE, 9.
Price, in contract of sale. See CONTRACTS, 1.
Primarily liable, in city charter. See RAILROADS, 2.
Proximate cause, in respect to injury. See APPEAL, 52. HIGHWAYS, 2.
Reasonable doubt, as to validity of title. See STATUTE OF LIMITATIONS, 2.
State prison, when house of correction is. See HABEAS CORPUS, 1.
WRIT.
Of attachment. See ATTACHMENT. CORPORATIONS, 3.
Of execution. See EXECUTIONS.
Of *habeas corpus*. See HABEAS CORPUS.
Of *mandamus*. See MANDAMUS.

5783 008

HARVARD LAW LIBRARY